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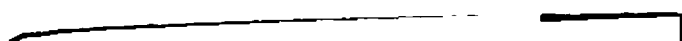
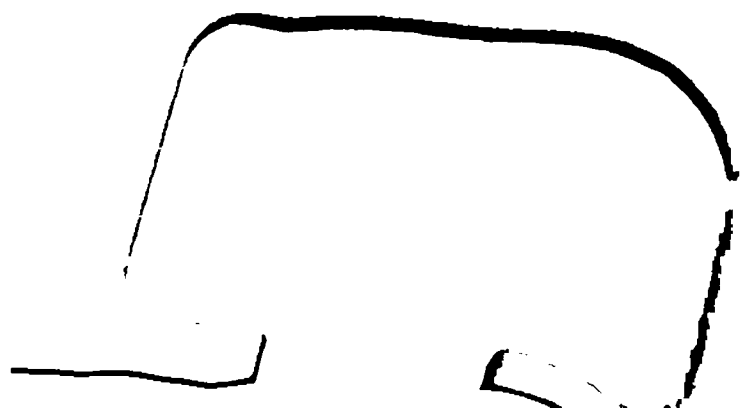
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**THE
AMERICAN REPORTS**

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. XLI.

**CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING
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WARWICK HOUGH,
ELIJAH H. NORTON,
JOHN W. HENRY,
ROBERT D. RAY.

* Died August 9, 1881.

† Resigned April 11, 1881.

‡ Appointed April 11, 1881.

§ Appointed September 5, 1881.

¶ Until January 1, 1882.

‡ From December 31, 1881.

** Died May 23, 1881.

†† Appointed June 23, 1881, vice F. R. E. Cornell.

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 AMASA COBB,
 SAMUEL MAXWELL

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TEXAS.

JOHN P. WHITE, PRESIDING JUDGE.
 CLINTON M. WINKLER,†
 JAMES M. HURT,
 SAMUEL A. WILLSON.**

* Appointed November 12, 1881, vice Charles J. Folger, resigned.

† Appointed December 8, 1881, vice Charles Andrews, appointed Chief Judge.

‡ To November 9, 1881.

¶ From November 9, 1881.

‡ From November 9, 1881.

† Died May 13, 1882.

** Appointed May 13, 1882.

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VERMONT.

JOHN PIERPOINT, CHIEF JUSTICE.*

HOMER E. ROYCE, †
TIMOTHY P. REDFIELD,
JONATHAN ROSS,
H. HENRY POWERS,
WHEELOCK G. VEAZEY,
RUSSELL S. TAFT,
JOHN W. ROWELL. ‡

WEST VIRGINIA.

CHARLES P. T. MOORE, PRESIDENT. §

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WISCONSIN.

ORSAMUS COLE, CHIEF JUSTICE.

WILLIAM P. LYON,
DAVID TAYLOR,
HARLOW S. ORTON,
JOHN B. CASSODAY.

* Died January 7, 1882.

† Appointed Chief Judge January 10, 1882.

‡ Appointed Assistant Judge January 10, 1882.

§ Resigned June 1, 1881.

| Appointed June 1, 1881.

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CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

HAMMEL v. QUEEN'S INSURANCE COMPANY.

(54 Wis. 73.)

Insurance — fire — change of title or possession — sale on execution.

Sale of real estate on execution, the owner having a term for redemption, is not a change in the title or possession, within the meaning of an insurance policy, where the loss occurred during that term.

ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

Finch & Barber, for appellant.

Barnes & Goodland and Leopold Hammel, for respondent.

TAYLOR, J. This is an action to recover upon an insurance policy against loss by fire. The respondent recovered in the court below, and the company appealed from the judgment. The only error assigned by the learned counsel for the appellant

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is, that it was shown upon the trial that after the policy was issued and before the loss, and without the knowledge of the company or its authorized agents, the real estate insured was sold upon an execution issued upon a judgment rendered against the plaintiff. The sale upon the execution took place on the 26th day of July, 1879, and the loss occurred on the 11th day of November, 1879. The judgment upon which the execution was issued and sale made was rendered and duly docketed on the 5th of June, 1878. The policy upon which this action is brought was issued on the 17th of May, 1879, and insured the property therein described for one year from the date of its issue.

It is claimed by the learned counsel for the appellant, that the sale of the real estate made by virtue of the execution issued upon said judgment rendered the policy void from the date of such sale, under the following condition in said policy: "This policy shall be void and immediately cease to be binding on the company, if the property be sold or transferred, or any alienation or change takes place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance."

[Omitting an immaterial statement.]

The jury found that the agents of the company had knowledge of the litigation which resulted in the judgment and sale above mentioned, before the policy was issued. They also found that they had no knowledge of the fact that judgment had been obtained, or that an execution had been issued thereunder and a sale made before the loss occurred.

The question to be determined is whether a sale of real estate upon execution, which had not yet become perfected by deed, and on which sale the time for redemption by the judgment debtor had not yet expired when the loss occurred, was a breach of the condition above quoted.

[Omitting an immaterial comment.]

Whether a sale of real estate upon execution is a violation of the condition of the policy above quoted, depends very much upon the nature and effect of such sale under the laws of this State. Under our laws the sale of real estate upon execution does not give the purchaser any right to the possession of the property sold until fifteen months after such sale takes place. During that time the original owner has the same right of possession, occupancy and use of the premises sold that he had before the sale, and during the

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twelve months next after the sale he has the absolute right to avoid the effect of the sale by paying the sum bid upon such sale, with interest at the rate of ten per cent. If the original owner die during the twelve months, the title descends to his heirs-at-law as though he were the absolute owner, and such heirs succeed to his right to redeem. So, if he convey the lands during such time, his grantee becomes vested with the title, and may redeem from the sale. The right of the purchaser is conditional, not only upon the right of the owner to redeem within twelve months after the sale, but also upon the further condition that other judgment creditors and mortgagees may redeem at any time within three months after the expiration of the twelve months within which the owner has such right. At the end of the fifteen months the purchaser may, if no redemption has been made, perfect the sale by demanding a conveyance from the officer who made it, or his successor in office; and when so clothed with the title, and not before, he may demand possession of the premises.

The purchaser has neither the title, possession nor right of possession until the time of redemption expires, and can maintain no action for any injury to the premises or the possession, unless such injury amounts to such waste as would entitle a remainder-man to maintain an action pending the life or other estate upon the termination of which the estate in remainder vests.

Is a sale which only authorizes the vendee to demand a conveyance of the title at a future date, which right to so demand the title is subject to be defeated at any time before that date by the owner, his heirs, assigns or judgment creditors, upon payment of the purchase-money and interest, and which leaves the right of possession and use in the original owner until such fixed date arrives, such a sale, transfer, alienation or change in the title or possession as is contemplated by the condition in the policy above quoted?

Keeping in mind the rule which governs the construction of all contracts, where the main purpose of the contract is sought to be avoided by the breach of a condition subsequent, which by its terms cuts off all inquiry into the question of its materiality, or whether the party seeking to avail himself of the breach has been injured thereby, we are clearly of the opinion that such sale was not a breach of the condition. The rule is well settled that in the construction of such conditions, if the terms are of doubtful meaning,

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or are susceptible of two constructions, that meaning will be given to them which is most favorable to the rights of the party seeking to uphold the contract, and most strongly against the party who seeks to avoid it, unless such latter construction be clearly against the intent of the parties, as shown by the whole contract. The words "sold," "transferred," "alienation" and "change of title," have been frequently defined by the courts in insurance and other cases, and we think the great weight of authority is against the construction sought to be put upon them by the learned counsel for the appellant.

In the case of *Jackson v. Silvernail*, 15 Johns. 278, where a lessee covenanted not to sell, dispose of or assign his estate in the demised premises without the permission of his lessor, and the sale contained a clause of forfeiture for the non-performance of the covenants, it was held that a lease of a part of the premises for twenty years was not a breach of the covenant and did not work a forfeiture, and that nothing but an assignment of his whole estate by the lessee would work a forfeiture. A like decision was made in *Jackson v. Harrison*, 17 Johns. 66. In *Jackson ex dem. Schuyler v. Corliss*, 7 Johns. 531, and *Jackson v. Kipp*, 3 Wend. 230, in case of a covenant that on every sale or assignment the reversioner should have the right to demand one-fifth of the consideration money, it was held that there was no breach of such covenant when the sale was made upon execution in a *bona fide* adverse proceeding.

In *Strong v. Ins. Co.*, 10 Pick. 40 (20 Am. Dec. 507), it was held that a condition in the policy, which provided "that if the property should be sold or conveyed in whole or in part, the policy should be void," was not broken by a sale upon execution. and that the provision in the policy referred only to voluntary assignments. See also *Smith v. Putnam*, 3 Pick. 221; *Doe v. Carter*, 8 T. R. 57; *Stetson v. Ins. Co.*, 4 Mass. 330 (3 Am. Dec. 217); *Franklin Ins. Co. v. Findlay*, 6 Whart. 483; Wood on Ins., § 326; *Baley v. Ins. Co.*, 80 N. Y. 21; s. c., 38 Am. Rep. 570; *Barlow v. Nat. B'k*, 63 N. Y. 399; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; s. c., 4 Am. Rep. 582; *Starkweather v. Ins. Co.*, 2 Abb. U. S. C. C. 67. These cases and numerous others that might be cited, seem to settle the question that the condition prohibiting a sale, transfer or conveyance of the insured property is to be construed as limited to a voluntary transfer, and not to a sale or transfer made by adverse legal proceedings. In all these and similar cases it is probable that if an adverse legal sale,

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transfer or conveyance of the insured property had been made previous to the loss, so as to divest the insured of all right, title or interest therein, no recovery could be had for want of an insurable interest in the policy-holder at the time of the loss. As this case clearly shows that the sale upon execution did not divest the insured of all title or interest in the insured property, nor of the possession thereof at the time of the loss, we might rest the affirmance of the judgment of the court below upon the ground that the conveyance, sale or alienation was not a voluntary one, and did not therefore come within the provisions of the condition, were it not for the words in the condition, "whether by legal process or judicial decree or voluntary transfer or conveyance;" but as it may be well urged that these words reach back to the beginning of the sentence, and give character to the words "sold or transferred," as well as to the words "alienation or change of title," we must determine the other question, whether the sale on execution unperfected was a sale, transfer, alienation, or change of title, within the meaning of the condition, admitting that the words refer to an involuntary as well as a voluntary sale, etc. We think all the decisions hold that these words mean such a change of the title of the insured property as divests the insured of the legal title, and gives the right of possession to some other person than the insured. They do not cover an executory contract for sale where the vendee does not by the contract become entitled to the possession, nor to an incumbrance of the estate by judgment, mechanic's lien, mortgage or otherwise, where such incumbrance is not created by some conveyance which gives the legal title to the incumbrancer. It will be found that in all the cases cited by the learned counsel for the appellant to sustain his position, there was an alienation or change of title shown. They were cases where there was, in fact, a transfer of the legal title before the loss.

In *Perry v. Lorillard Ins. Co.*, 61 N. Y. 214; s. c., 19 Am. Rep. 272, the court held that a condition similar in all respects to the one in this case was broken by an assignment in bankruptcy of the insured property before loss. The opinion is based upon the ground that the proceedings in bankruptcy transferred the legal title and possession from the insured to the assignee in bankruptcy, and although there might still remain in the insured an insurable interest, yet there having been a transfer in law and in fact of the title and possession, the condition was broken.

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In *Abbott v. Ins. Co.*, 30 Me. 414, it was held that a by-law of the company, which prohibited the insured from selling or alienating the property in whole or in part, was broken by a sale of the property insured, although the insured upon such sale took back a mortgage for a part of the purchase-money. Upon this sale the purchaser was let into possession, and he was in possession when the loss occurred.

In *Tomlinson v. Ins. Co.*, 47 Me. 232, where by the terms of the policy it was to be absolutely void "if the insured, without the assent of the company, alienated the property in whole or in part," it was held that the insured having mortgaged the insured property after the policy issued, and after making such mortgage having transferred his equity of redemption to another person, from whom he took back a bond of defeasance, which was not recorded as required by law, in order to convert such second transfer into a mortgage, avoided the policy. It does not appear in this case whether the insured remained in possession at the time of the loss or not.

In *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; s. c., 3 Am. Rep. 711, it was held that an absolute sale and transfer by the mortgagor of the insured premises, before the loss, avoided the policy, though the loss was made payable to a mortgagee of the insured property. In *Savage v. Ins. Co.*, 52 N. Y. 502; s. c., 11 Am. Rep. 741, the policy contained the following condition: "If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." It was held that the policy was avoided by a sale and conveyance of the property by the assured before loss, although the purchaser gave back to the insured a mortgage for the greater part of the purchase-money. The grantee and mortgagor was in possession when the loss occurred.

In all these cases it will be seen that there was an alienation or conveyance of the property itself; the title of the insured was changed and transferred to another, either by his own act or by operation of some legal process, judgment or decree; and in all but one the possession was also changed.

In *Orrell v. Fire Ins. Co.*, 13 Gray, 431, the policy contained the following condition: "In case of any sale, transfer, or change of title in the property insured by this company, such insurance shall be void." Upon the trial the court instructed the jury as

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follows upon the question of forfeiture: "That to constitute an alienation it must be such as to pass the legal title as between the parties to it; that it need not be such a sale as would be valid as against the creditors of the plaintiff; that a mere agreement of the parties to represent to creditors that there had been such sale to protect the property from attachment, when in fact nothing had been done by way of formal transfer of the property, would not constitute such alienation as would defeat the policy." This instruction was upheld by the Supreme Court.

In *Conover v. Ins. Co.*, 3 Den. 254, it was held that under the statute creating the corporation, which provided that when the property insured by the corporation should be alienated by sale, or otherwise, the policy should be void, the giving of a mortgage upon the property insured after it was issued, and before loss, did not avoid the policy; that a mortgage was not an "alienation, by sale or otherwise," within the meaning of the charter.

There is an almost uniform line of decisions upon conditions similar to the one in the policy under consideration, which hold that nothing short of a change of the legal title to the property insured will be a breach of the condition; and this has always been so held where the insured remains in possession, and has the right of possession when the loss occurs. Some cases have held that an executory sale and possession taken by the vendee before loss would avoid the policy. Where a policy contained the condition that "when any property insured in the company shall in any way be alienated, or where the title of any property insured shall be changed by sale, mortgage or otherwise, the policy shall be void," it was held that giving a mortgage upon the insured property was not a breach of the condition. *Shepherd v. Ins. Co.*, 38 N. H. 232; *Folsom v. Ins. Co.*, 30 id. 231; *Rollins v. Ins. Co.*, 25 id. 206.

In the case of *Shepherd v. Ins. Co.*, the court in commenting on the construction which should be put upon the terms "when the title shall be changed by sale, mortgage," etc., say: "The title may be changed by a mortgage and foreclosure, but it is not either a vulgar or technical expression to speak of a change of title by the mere execution of a mortgage. In equity, and even at law a mortgage is not regarded as a title to land. It is considered a lien, or incumbrance, which may transfer the title to the mortgagee; but the mortgagor is regarded as the owner until entry of the mortgagee or foreclosure. We may so readily imagine a great variety of

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forms of expression which would make a policy void if the property should be mortgaged, that it may be fairly inferred from the use of the phrase, 'when the title shall be changed,' that it was not designed to include a mere mortgage." These comments are quite applicable to the condition under consideration. It is admitted that suffering a judgment to be obtained against the insured, which would be a lien upon the real estate insured, would not be within the terms of the condition, and it seems to us equally clear that the giving of a mortgage would not; otherwise there would be no sense in the condition contained in the note, viz.: that "the commencement of proceedings to foreclose a mortgage shall be deemed an alienation." If it were intended that the mere giving of a mortgage on the insured premises should be a violation of the condition, there was no necessity of adding, by way of explanation, that the commencement of an action to foreclose the same should be deemed an alienation. This explanation clearly shows that the giving of a mortgage was not prohibited by the previous condition. But there are abundance of decisions which hold that the giving of a mortgage is not a sale, transfer, alienation, change, or conveyance of the property insured. *Jackson v. Ins. Co.*, 23 Pick. 418 (34 Am. Dec. 69); *Allen v. Franklin Ins. Co.*, 9 How. Pr. 501; *Pollard v. Ins. Co.*, 42 Me. 221; *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432; *Tomlinson v. Ins. Co.*, 47 Me. 232. Wood, in his work on Insurance, § 325, cites the case of *Edes v. Ins. Co.*, 3 Allen, 362, as an authority holding that the giving of a mortgage was a breach of a condition in a policy which rendered the policy void "when the property shall be alienated by sale or otherwise;" but upon examination of the case we find the condition under which the court held the giving of a mortgage avoided the policy was as follows "When any property insured shall be alienated or incumbered by sale, mortgage, assignment or otherwise, the policy shall thereupon be void."

Arguing from analogy it would seem to follow that a sale of real estate upon execution, which has the limited effect given to it by our laws in the way of conveying title, would not amount to an alienation, conveyance, sale, or change of title, within the meaning of the condition in the policy in question. We are not however without authority upon this specific question.

In *Strong v. Ins. Co.*, 10 Pick. 40 (20 Am. Dec. 507), it was held that a sale of real estate upon execution, which left in the owner the

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right of redemption, was not a breach of a condition in the policy which provided, "that if the property should be sold or conveyed, in whole or in part, the policy should be void." It is said in the head-note to this decision that the court also held "that the provision in the policy referred only to a voluntary conveyance;" but we find no mention of that fact in the opinion delivered in the case.

In *Loy v. Ins. Co.*, 24 Minn. 315; s. c., 31 Am. Rep. 346, it was held, that under a policy containing the exact language contained in the policy in this case, the giving of a mortgage by the holder of the policy on the property insured, and a sale made upon the mortgage by advertisement, which left a right of redemption in the policy-holder at the time of the loss, did not avoid the policy, and was not a breach of the condition. The court in this case state the rule adopted by all the courts in construing contracts of this kind, in the following clear and very plain manner: "The question for consideration is whether the foreclosure sale was a 'sale, transfer, or change of title' within the meaning of the foregoing condition, such as avoided the policy. In construing a condition of this character, if upon consideration of the whole contract, it is uncertain whether the language of the stipulation is used in an enlarged or restricted sense, or if it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured to the indemnity, which it was his object in making the insurance to obtain, that should be adopted which is most favorable to the insured, and most in harmony with such, the main purpose of the contract on his part. The reasons for this are twofold: The tendency of any such stipulation is to narrow the range, and limit the force of the underwriter's principal obligation. It is also inserted by him for his own benefit, and in language of his own choice. If any doubt arises as to its meaning the fault is his in not making use of more definite terms in which to express it. Hence the rule of strict construction against him, and the liberal one in favor of the assured, which prevail under such circumstances."

This case we think cannot be distinguished from the case at bar. It might be urged that there is a distinction between the case of executing a mortgage upon the premises under which no sale had been made, and the sale of real estate upon execution, so far as the two things affect what insurance men call the moral hazard. In the case of the mortgage before sale the insured would be person-

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ally liable to pay the mortgage debt, whether the mortgaged premises were burned or not; but after a sale upon execution the personal liability to pay the debt to the amount bid on such sale is extinguished, and the purchaser takes the risk of the loss, if the property be destroyed by fire or otherwise before he becomes entitled to a conveyance of the title and possession under it. In the case last cited the purchaser took the same risk after he purchased at the mortgage sale, and the personal liability of the assured was extinguished when the sale was made, although, as in the sale on execution, the right of redemption remained in the assured, as well as the title, until the time arrived when the purchaser was entitled to his deed.

In the following cases it is held that executory contracts for the sale of the insured property do not avoid the policy under similar conditions: *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9; *Masters v. Ins. Co.*, 11 Barb. 624; *Clinton v. Ins. Co.*, 45 N. Y. 454; *Phillips v. Ins. Co.*, 10 Cush. 350; *Hill v. C. V. Mut. Protection Co.*, 59 Penn. St. 474; *Washington Fire Insurance Co. v. Kelly*, 32 Md. 421; s. c., 3 Am. Rep. 149; *Jackson v. Ins. Co.*, 16 B. Monr. 242; *Power v. Ins. Co.*, 19 La. 28; *Hutchinson v. Wright*, 25 Beav. 444. The last case was a marine insurance, and before loss the assured transferred his interest to a third person by an absolute conveyance, and his vendee was entered as owner on the register; but upon the trial it was proved that the transfer was in fact a mortgage. The defendant insisted that the policy was avoided under two provisions of the association. The first was that if the ship was sold the risk should cease from the date of the sale, unless notice was given to the secretary. No notice of sale or mortgage either was given to the secretary. The other provision was, "that no vessel which is mortgaged shall be insured, unless the mortgagee give a written guaranty," etc. No such guaranty had been given. It was held that the plaintiff could recover, notwithstanding the form of his conveyance, upon proof that it was intended as a mortgage in fact; and second that the mortgage given after the insurance was not a violation of the second provision.

It seems to us that the words used in the condition in this policy clearly look to such a sale, transfer or alienation as passes the title and carries with it the right of possession. Such is the definition of the words "sold," "transferred," "alienated;" and if they are

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made to include a sale upon execution, it is by giving them a meaning which they do not ordinarily receive. The added words, "change in the title or possession," do not extend the meaning. It is the title to the estate which is to be changed, not a mere right which may or may not ripen into a change of title. If the words "whether by legal process or judicial decree" were omitted the condition would read: "If the property be sold or transferred, or any alienation or change takes place in the title or possession by voluntary transfer or conveyance." If that were the condition it would be quite clear that the sale, transfer, alienation, or change of title would not include a mere agreement to sell, where the legal title still remained in the vendor, for the reason that such agreement would not be a transfer or conveyance of such property or the title, unless the possession were transferred in fact to the purchaser.

If the plaintiff had made a written agreement with his judgment creditor to convey the title to him in satisfaction of his debt, or any definite part thereof, such conveyance to be made one, two, or ten years after the date of the contract, unless within that time he paid the amount of the judgment, or such part of it as was agreed upon with interest, the plaintiff to have the right of possession, occupation and use of the premises in the meantime, the same as if no such contract had been made, it seems to me that under all the authorities such agreement would not have been a breach of this condition. It would not have been a sale, transfer, alienation, or change of the title or possession. It would simply be a contract to make a sale, transfer, alienation or change of title in the future, subject to a condition which would avoid the contract if complied with by the plaintiff. There would be no present change of title; and it seems clear that the words in the policy should be construed to mean a present change, and not a mere agreement for a change in the future. The contract above supposed is in fact the contract which the law makes for the parties upon an execution sale of real estate under the laws of this State.

We think the execution sale was not a breach of the condition in the policy.

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Borchardt v. Wausau Boom Company.

BORCHARDT V. WAUSAU BOOM COMPANY.

(54 Wis. 107.)

Water and water-courses — damage by boom company.

A corporation, authorized by the legislature to construct a boom in a navigable river, is not liable for flowage of land caused by an extraordinary freshet, not reasonably to have been anticipated and guarded against, although to some extent occasioned by the boom, the boom having been properly constructed.*

ACTION of damage to land by flowage. The opinion states the case. The plaintiff had judgment below.

Silverthorn & Hurley, for appellant.

M. M. Charles and Finch & Barber, for respondent.

ORTON, J. This action is brought to recover damages to the premises of the plaintiff situated above the works of the boom company on the Wisconsin river, by flowage caused by such works. The company was authorized to construct and maintain such works at that place, and in such manner, by a charter granted by the legislature of this State by chapter 45, P. & L. Laws of 1871. There was evidence tending to show that in ordinary seasons of high water said premises were not at all flowed, and that the great freshets, which, together with the works of the company caused the flowage complained of, were uncommon, unusual and extraordinary, and could not have been reasonably contemplated, anticipated or expected at the time such works were constructed.

In *Cohn v. Wausau Boom Co.*, 47 Wis. 314, it was held that under the amendment of its charter by chapter 256, Laws of 1873, this company was a *quasi* public corporation, and an agent of the State for the improvement of the Wisconsin river. The seventh instruction asked by the appellant was as follows: "I charge you that if the evidence convinces you that the damages claimed were only incidental to an additional rise of water during extraordinary freshets, although such additional rise of water was caused by the temporary stoppage of logs at defendant's works, the plaintiff can-

* See *City of Allegheny v. Zimmerman*, 95 Penn. St. 287; s. c., 40 Am. Rep. 649: *Black River Improvement Co. v. La Crosse Booming & Transp. Co.*, post.

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not recover in this action.” We think the refusal of the court to give this instruction was error. It was contended by the learned counsel of the respondent that this instruction was in effect given in the general charge; but we are unable to find any part of the general charge containing this principle, viz.: that for damages occasioned solely by, and which were only incidental to, an additional rise of water in the river during extraordinary freshets, the company is not liable, notwithstanding they might have been to some extent occasioned by its works being in the river. These works were lawfully and rightfully in the stream, and the company should be held responsible only for all direct and proximate consequences, and perhaps for such consequences, indirect and remote or incidental, as might have been reasonably expected to follow from their construction and maintenance. This we understand to be the extent of the rule; and injuries incidental only to natural occurrences which are so extraordinary, unusual and uncommon that they could not have been reasonably contemplated, anticipated or expected, are *damnum absque injuria*. In application to this case, the doctrine may be stated that this company would be liable for all damages by flowage back of the waters of the river occasioned by their works, in all such conditions of the river as might have been reasonably anticipated or expected. Such conditions would be not only the natural rise and fall of the waters during the year, but also the floods and freshets which occur annually, or at longer periods or intervals, if regularly, and which from having been known to occur at such periods or intervals might be reasonably expected to occur again. But on the other hand, if no damages whatever result from these works during the ordinary and usual fluctuations of the river, and the damages complained of resulted from a flood which to the same extent had never occurred but once before, so far as known, and that very long ago, and which might not reasonably have been expected to occur again, and which was so unusual or phenomenal as to excite wonder or surprise, then they cannot be recovered. It is of course very difficult to lay down any certain rule by which such occurrences are to be deemed to be so extraordinary and unusual as to exempt the company from liability for their consequences in connection with their works; and such matter may properly be left to the judgment of the jury, under an instruction by the court in which this principle of the law is clearly stated. This principle is of the utmost importance to the existence and

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purposes of corporations which are created to build and maintain works of internal improvement, in part for the public benefit, by the investment of private capital. All of the ordinary and natural consequences of their works may well have been contemplated and expected, and their ability to meet such consequences and compensate for such damages as would be likely to occur may be ample and constantly maintained; but one extraordinary and unforeseen event happening from natural causes, against which no provisions or precautions are or could be made, may sweep away in a day or an hour not only all of their profits but their capital, and bankrupt and destroy the corporation itself. In view of such extraordinary risks and hazards, capital would not be likely to seek such an investment, and such enterprises of great public importance and benefit would be avoided. But without further illustration or vindication of the principle, we think there was evidence in this case from which the jury might have found such facts as would have warranted its application, and as required its statement as a matter of law in the instruction asked. This doctrine has been recognized and approved and clearly stated by this court, as well as by other courts, and is made to rest upon the common and familiar rule of damages, that only such can be recovered as do naturally and would ordinarily follow from and are proximate to the cause, or such as might have been contemplated, anticipated or expected to result from such a cause.

In *Alexander v. City of Milwaukee*, 16 Wis. 247, this principle was not involved, and the city was held exempt from liability for the flooding of the plaintiff's land by the waves of the lake being driven by winds from the east, but which would not have submerged it if the works had not been constructed, on the ground that the works were built in a lawful and discreet manner by the city, wholly for the public benefit, and in the precise way authorized by the legislature. It may not be necessary to decide the question, but we are inclined to think that a corporation such as this is defined to be in *Cohn v. Wausau Boom Co.*, *supra*, as *quasi* public, and the agent of the State in constructing its works does not stand upon the same footing with municipal corporations making improvements for the public benefit, as in the above case. The principle here involved is found in the maxim, *causa propinqua non remota spectatur*, and in application to this case it is well stated in the text of Angell on Water Courses, § 349: "If in the case of the obstruction of a

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public river it appears that injury resulting therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, or the collection of ice, the whose superstructure is the immediate cause of the mischief is liable for the damages. On the other hand, if the injury is occasioned by an act of Providence, which could not have been anticipated, no person can be liable." This is the head-note to the case of *Bell v. McClintock*, 9 Watts, 119. closely analogous to this case in the injury of the lands of the plaintiff by flowage caused by the works of the defendant across the river below. The injuries complained of were of two descriptions: those which arose from the ordinary freshets which were of common and periodical occurrence, and those which arose from the extraordinary floods of two certain years. The court below ruled that the defendant was liable for all damages from the ordinary, common and expected floods of the season, but not for those occasioned by the uncommon, unexpected and extraordinary floods. These rulings are approved; and after stating the true rule of liability for the ordinary freshets or floods which might have been expected with considerable certainty at fixed times and seasons, it is said in the opinion: "But when the injury arises from some cause out of the ordinary course, from some unusual cause — as for instance, from a flood or freshet such as has been described by the witnesses, — the owner of the dam is not liable. It is *damnum absque injuria*. They are not such accidents as ordinary foresight or prudence could guard against."

In *Sabine v. Johnson*, 35 Wis. 185, "the (Circuit) court was asked to instruct the jury, that in determining the plaintiff's right to recover, they were to consider the increased flowage of his land at an ordinary stage of water only, and not the effects of freshets." The court refused so to instruct, and this court affirmed such ruling on the ground that the instruction "does not limit the exemption from liability to the effects of those unusual and extraordinary freshets which human sagacity cannot foresee, nor experience foretell;" and cited approvingly the above text from Angell on Water-Courses.

In *Allen v. City of Chippewa Falls*, 52 Wis. 430; s. c., 38 Am. Rep. 748, the liability of the city is rested on its negligence in not providing means for carrying off the water in times of heavy rains in connection with its other works, and not on the ground of exemption of municipal corporations from liability for injuries to

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property not taken or directly affected by works of improvement, as in *Alexander v. Milwaukee*, *supra*; and this court, in the opinion of the present chief justice, says: "The duty of providing against an extraordinary rainfall or unusual freshet, such as does not occur but once in a series of years, which persons of ordinary prudence would not think of guarding against, is a burden which ought not to be imposed upon the city."

In *Smith v. Agawam Canal Co.*, 2 Allen, 355, it was admitted that when the water was unaffected by ice and freshets it did not in any manner affect the plaintiff's mills above, and that on such occasions the water and ice set back upon the plaintiff's premises; and the court says: "From these facts it is a necessary consequence that if the plaintiff sustained any damage by the rise of water, it must have been owing to the occurrence of freshets and extraordinary floods." For the results of such causes the defendants were held not responsible. The principle seems to be properly expressed, that for damages arising from "forces casual and extraordinary" the parties constructing such works in or across rivers are not responsible. To the same effect are *Inhabitants of China v. Southwick*, 12 Me. 238; *Monongahela Navigation Co. v. Coon*, 6 Barr, 379; and *Mayor v. Bailey*, 2 Den. 433.

In *Gray v. Harris*, 107 Mass. 492; s. c., 9 Am. Rep. 61, the evidence was that such a flood had occurred once or twice before, but at long intervals, and the court below directed a verdict for the defendant on the ground that such a flood could not have been reasonably anticipated as a matter of law. This ruling was reversed because the question was one of fact upon the evidence, and should have been submitted to the jury, and it is said in the opinion: "It is impossible for us to say judicially, upon this evidence, that this was so great a freshet that the defendant was not bound to anticipate and provide against it."

This principle is distinct from that which exempts municipal corporations from liability for injuries to lands not taken or directly affected by works of improvement constructed solely for the public benefit according to law, and from that which is expressed in *Panton v. Holland*, 17 Johns. 92 (8 Am. Dec. 360). "that a possible damage to another in the cautious and prudent exercise of a lawful right is not to be regarded, and if a loss is the consequence, it is *damnum absque injuria*."

It is therefore only intended to be decided in this case, that as

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there was evidence tending to show that the flood and freshet which caused the damages complained of was so unusual and extraordinary that the plaintiffs could not have anticipated or expected it, such fact should have been submitted to the jury under an instruction clearly presenting this principle. The instruction asked is not very clearly expressed to present it, but its meaning is sufficiently apparent, and we think the Circuit Court ought to have given this instruction as asked, or one more clearly expressing the principle intended.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial therein.

Judgment reversed, and new trial ordered.

 RANDALL V. NORTHWESTERN TELEGRAPH COMPANY.

(54 Wis. 140.)

Evidence — declaration of agent of corporation.

An admission by the general agent of a telegraph company, of its liability for an accident alleged to have been caused by its negligence, two months after the accident, is incompetent. *

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

L. M. Vilas, for appellant.

Meggett & Teall, for respondent.

TAYLOR, J. This action was brought by Thomas E. Randall, in his life-time, to recover damages for an injury occasioned, as he alleges, by the carelessness and negligence of the appellant company in not keeping in proper repair their telegraph line in the county of Chippewa. The complaint avers that by reason of such carelessness and negligence the wire of said line became loosened from the poles and fell across a public highway in the town of La

* See *Ryan v. Gilmer* (2 Mont. 517.), 25 Am. Rep. 744; *McDermott v. Hannibal and St. Jo. R. Co.* (73 Mo. 516), 39 Am. Rep. 526.

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Fayette, in said county ; and that while the said Randall was travelling along said highway with his horses and carriage without any fault on his part, his carriage became entangled in the wire which had so fallen across said highway, and was overturned and damaged, his horses became frightened and unmanageable, and he was thrown from the carriage, and was thereby permanently injured. The complaint also alleges that the appellant company had previous to the accident abandoned the use of said telegraph line, and had negligently and wrongfully failed to remove the poles and wire, as required by the statutes in such cases provided. The answer denies any negligence on the part of the company, and alleges that the injury received by the said Randall, his carriage and horses, was caused by his own negligence and carelessness, and not by the carelessness and negligence of the said company, its agents or employees.

[Omitting an *obiter* consideration.]

The plaintiff offered in evidence the following telegram from Mr. Haskins, the superintendent of the appellant company, viz. :

“ *To Gen. George C. Ginty* : Many thanks for your kind words for us to the gentlemen who were hurt by our old wire. I hoped to be with you to-morrow and see them, but I must go home. Have them make a bill and sent me. We will pay any reasonable bill. My instructions, if obeyed, would have prevented the accident, but the repair-man neglected his duty, and we must pay the penalty.
Answer.

[Signed]

“ C. H. HASKINS, *Gen'l Supt.* ”

This telegram was sent October 20, 1879, and the accident took place August 25, 1879.

The introduction of this evidence was objected to by the appellant upon two grounds : first, because it was “secondary evidence, and not the original dispatch ;” and second, because it was “incompetent, irrelevant and immaterial.” The objections were overruled, and the appellant duly excepted. It is clear that this telegram was not a part of the *res gestæ*, and its admission as original evidence against the defendant can only be sustained upon the ground that the admission of the general agent or superintendent of the company bound the company. In the absence of any proof showing that the superin-

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tendent was authorized by the company to bind it by his admissions, we do not think the court was justified in assuming that he had such power. He was a competent witness for the plaintiff, and though holding a high position as an agent of the defendant, he was still only an agent, and for the purpose of admitting away the rights of the defendant he cannot be presumed to have all the powers of the corporation.

The inadmissibility of this evidence is fully established by the following cases cited by the learned counsel for the appellant, and upon well-established principles of law: *Mil. & Miss. R. R. Co. v. Finney*, 10 Wis. 388; *Betts v. Farmers' L. & T. Co.*, 21 id. 80; *Livedey v. Lasalette*, 28 id. 38; *Hazleton v. Union Bank*, 32 id. 34; *Richards v. Noyes*, 44 id. 609; *Rounsavell v. Pease*, 45 id. 506; *Austin v. Austin*, id. 523; *Packet Co. v. Clough*, 20 Wall. 540; 2 Whart. on Ev., §§ 1090, 1174-6; 2 Thomp. on Neg. 848, note 7. These cases show that the rank or station of the person making the admission does not affect the question of its admissibility. In *Hazleton v. Union Bank* the admission of the president of the bank was held inadmissible. In *Packet Co. v. Clough* it was held that the admission of the captain of the boat could not be admitted. The authority to make the admission for the principal or corporation is not to be inferred from the position or rank of the party making the same. If such authority is alleged to exist, it must be shown by competent proofs.

[Omitting other matters.]

Judgment reversed and cause remanded.

BIERBACH V. GOODYEAR RUBBER COMPANY.

(54 Wis 208.)

Evidence — profits of business — preponderance of witnesses.

In an action of damages for personal injuries incapacitating the plaintiff from attending to his business as a manufacturer, evidence of the average profits of such business is incompetent.

It is error to charge that if witnesses are equally credible, the greater number are entitled to the greater weight.

ACTION of damages for personal injuries by negligence. The opinion states the points. The plaintiff had judgment below.

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E. P. Smith, Nath. Pereles & Sons, and J. G. Jenkins, for appellant.

Austin & Runkel, for respondent.

LYON, J. Numerous errors are alleged on behalf of the defendant, but the conclusion we have reached upon two of them renders it unnecessary to pass upon the others.

1. On the trial, the plaintiff testified in his own behalf that when injured his business was the manufacturing of machines for cleaning feathers, and another article known as the Bierbach wagon patent, and that he continued in such business for several months after he was injured, when he sold out and gave it up. He also testified in his own behalf, under objection, that his average business was worth from \$75 to \$100 per month, and that he gave it up because on account of his injuries he was unable to attend to it. To the question: "After you were injured, did you carry on your business for any length of time?" put to him by his counsel, he answered, "Yes, sir; I carried it on, but I did not attend to it but a few months. I got negligent and didn't care, I was in such a condition. But when orders came, my man would attend to them." As a basis for the assessment of damages, proof of the average value of the plaintiff's business while he carried it on was clearly incompetent. It could only be used to enable the jury to estimate therefrom what the future profits would have been had the plaintiff not been injured, and had he continued in the business. Such a basis for the estimate of the future profits of the business in which the plaintiff was engaged is altogether too uncertain to furnish a safe guide for the verdict of a jury.

In *Masterton v. Mount Vernon*, 58 N. Y. 391, the plaintiff sued a municipal corporation to recover damages for personal injuries caused by a defective highway. It appeared that the plaintiff and his partner were importers and dealers in teas, and had been for many years. The plaintiff made the purchases, which required a high degree of skill. He possessed the requisite skill. Their business was extensive, but there was a great falling off in it because the plaintiff was unable, by reason of the injuries complained of, to make the purchases. Judgment for the plaintiff was reversed because the trial court permitted the plaintiff, testifying in his own behalf, to answer this question: "About what have been your

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profits, year by year, in that business ?” After referring to several cases, and among them to the cases of *Nebraska City v. Campbell*, 2 Black, 590, and *Wade v. Leroy*, 20 How. 34, in which it was held competent for a physician in an action for personal injuries to prove the extent of his practice, the court proceeds to say : “ In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown to enable the jury to conjecture what the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish a safe guide in fixing the amount of damages. * * * The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and if he could, the compensation usually paid to persons doing such business for others. These circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged.”

The foregoing remarks apply with equal force to this case, and it is believed that they contain a sound exposition of the law of evidence applicable to it. Substantially the same principle was applied by this court in *Blair v. Mil. & Pr. du C. Railroad Co.*, 20 Wis. 262. Indeed the testimony, the admission of which worked a reversal of the judgment in that case, was more direct and specific, and hence less objectionable, than that admitted in the present case. There the testimony was confined to the damages sustained by the plaintiff's firm by reason of the inability of the plaintiff to give his personal attention to the business, while here the testimony goes to the value of the whole business, when it is apparent that the plaintiff might have continued the business by employing proper agents to carry it on, notwithstanding his injuries. See also *Lincoln v. Railroad Co.*, 23 Wend. 425.

We conclude that it was error to permit the plaintiff to give testimony of the value of his business when he carried it on. In view of the large damages awarded by the jury, it is fair to presume that such testimony materially enhanced the damages. It is clear that it may have done so. Hence, the error is material, and fatal to the judgment.

[Omitting a point of pleading.]

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2. The court instructing the jury as to the rules of determining the relative weight of conflicting testimony, used this language: "Of course, if the witnesses are equally credible, and they so present themselves to the mind of the jury, then the greater number of witnesses on one side or the other would be entitled to the greater weight." We think the instruction was erroneous. It laid down an arbitrary rule for determining which way the evidence preponderated where there was a conflict of testimony. That is to say, the witnesses being equally credible, disputed propositions of fact should be determined by a count of the witnesses and an application of the majority rule. We are not aware of the existence of any such rule of evidence. Indeed, in *Van Doran v. Armstrong*, 28 Wis. 236, this court substantially held that there is no such rule, but that the jury are free to believe the minority of the witnesses, and a verdict based upon the testimony of such minority will not be disturbed because opposed to the testimony of the majority. The jury alone are to determine not only the credibility of the witnesses, but also the weight which should be given to the testimony of each. The above instruction invaded the province of the jury in that respect, and was an unwarrantable interference with their peculiar and exclusive functions.

There is another fatal objection to the instruction. It ignores every condition but that of credibility, whereas there are other conditions which should be considered in framing a rule on that subject. It makes no distinction between the relative weight of positive and negative testimony—a distinction well established in the law (3 Greenl. Ev., § 375; *Ralph v. Railway Co.*, 32 Wis. 177; s. c., 14 Am. Rep. 725); and it takes no account (in terms, at least) of the possible fact that some of the witnesses may have had better facilities for knowing the facts than others, or remembered them more distinctly. The jury may well have understood the word "credible" to refer only to the integrity of the witnesses. But the most serious objection to the instruction is the one first above indicated, to wit, that it invaded the province of the jury, and sought to bind them by a rule unknown in the law. This error was also material, and may have prejudiced the defendant. There was conflicting testimony on material propositions of fact, and some of the testimony hostile to the defendant's theory of the case was negative in its character. Besides, some of the witnesses

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had better means of knowing the facts to which they testified, than some of the opposing witnesses who testified in relation to the same facts.

Because of the two errors above indicated, the judgment of the County Court must be reversed, and the cause remanded for a new trial.

By the Court.—So ordered.

Judgment reversed.

YORTON V. MILWAUKEE, LAKE SHORE & WESTERN RAILWAY CO.

(54 Wis. 234.)

Carrier — railroad company — stop-over tickets — ejection for non-payment.

A regulation of a railroad company, requiring passengers desiring to stop over between the starting point and the destination to procure stop-over tickets, is reasonable.

If a passenger asks a conductor for a stop-over ticket, and by his mistake receives only a trip check, the second conductor may lawfully eject him for non-payment of additional fare.

ACTION for illegal ejection from a railway train. The opinion states the case. The plaintiff had judgment below.

Cottrill, Cary & Hanson, for appellant.

E. P. Smith and Nath. Perles & Sons, for respondent.

COLE, C. J. It is an admitted fact that the plaintiff purchased a ticket at Marion for transportation over the defendant's road to Oshkosh, and took the train at the former place. For the purposes of this appeal, it is assumed that he delivered that ticket to the first conductor, Sherman, and asked for a stop-over ticket at Clintonville, an intermediate station, and that through the fault or mistake of the conductor he received a trip or train check instead of a stop-over ticket, which he asked for, and which the conductor undertook to give him. It may further be assumed that he was not bound to read the check, and was guilty of no negligence in not reading it (though it would certainly have notified him that it only entitled him to ride on that train), and then calling the attention of the conductor to the mistake he had made.

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These facts being assumed in the plaintiff's favor, we may further assume that his account of the circumstances attending his ejection from the train is, in the main, correct. He says, in substance, that the next morning, when he took another train at Clintonville, under charge of another conductor, when asked for his ticket, he presented the check which Sherman had given him. The second conductor properly told him that he could not ride on his train on that check; that it was only good with Sherman; and that he must either pay his fare to Oshkosh or leave the train. This was said to the plaintiff while upon the cars at Clintonville, before the train started, and while he had ample opportunity to leave the train. Indeed, the plaintiff testified that this same conversation was repeated before the train started from Clintonville, the conductor all the time telling him that the check gave him no right to ride on his train, and that he must either pay his fare or leave the train, while he asserted his right to go on that train, because he had once paid his fare. Thus the matter stood when the train left Clintonville, the plaintiff remaining on the cars; and as the train approached the next station, upon his fare being again demanded by the conductor, and refused, he was forcibly ejected from the train at the Bear Creek station, more than six miles from Clintonville. He was left at the station at about 3 : 30 o'clock in the morning on the 28th of October; the depot was closed, and he was unable to obtain shelter; he was exposed to cold, damp winds, contracted a violent cold, and became sick. This exposure and sickness, resulting from being ejected from the train at the time and in the manner he was, constituted his principal claim for damages.

On the question of damages the learned County Court charged the jury, that if they found the facts relating to the purchase and surrender of the ticket by the plaintiff, and his expulsion from the train, to be as detailed by the plaintiff's witness, then the plaintiff was entitled to recover full compensatory damages for the defendant's acts; that in assessing such damages the plaintiff was entitled to recover not only for the mere pecuniary loss and expense, loss of time, and inability to attend to his business, directly resulting from said acts, but also for bodily suffering, mental pain and disquietude, and the sense of injury and humiliation felt from the indignity inflicted in being so unjustly expelled from the cars; that this would include all bodily ailments, lameness, suffering and fatigue resulting from his being so ejected, or from the exposure of the

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weather in the night ; that in considering the question of damages the jury might take into account the manner and time of the plaintiff being ejected from the cars, the situation and surroundings of the place where he was so ejected, and all circumstances which had been shown going to aggravate the injury, and assess full damages therefor.

This is the substance of the charge on the question of damages, and it manifestly goes upon the hypothesis that the plaintiff had a right to ride upon the train on the facts detailed by him, and that his expulsion therefrom was unlawful. In this view we think the learned County Court erred. The learned counsel for the defendant insists that no claim for any damages whatever was shown or established. He says the ticket first bought was for a continuous passage from Marion to Oshkosh, and that as the plaintiff voluntarily left the train at Clintonville, the company was under no obligation to give him a stop-over check or transport him on another train. But the conductor, Sherman, testified that he was accustomed to give these stop-over checks when requested by passengers, and he was doubtless authorized to give them. The reason why he did not give one to the plaintiff when he took up his through ticket, he says, was because the plaintiff did not ask for one, being then uncertain whether he would stop at Clintonville or not; consequently he gave him a trip or train check only. This was Sherman's understanding in the matter, and a stop-over check was not given because it was not asked for, and not for the reason that it was unusual to give them. Without attempting to settle the conflict in the testimony upon this point, we assume that a stop-over check was asked for by the plaintiff when he surrendered his ticket, and that it was the conductor's fault that he did not receive one. Then the question arises, was the plaintiff entitled to ride on a subsequent train, not having a proper stop-over check, or was the second conductor justified under the circumstances in putting him off the train when he refused to pay his fare ? The court below held that a rule or regulation of a railway company requiring passengers who ride upon its trains to procure from the conductor, or person in charge of the train, a stop-over check if they desire to stop before concluding their journey or before reaching the point to which they have purchased a ticket, is a reasonable rule and binding on passengers riding on its trains. The correctness of this proposition is hardly debatable. Now it is practically conceded that the defendant company

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had such a rule or regulation for the guidance of its conductors. If it had, it would necessarily follow that it was the clear duty of the second conductor to obey and enforce the rule or regulation. Consequently he was perfectly justifiable in ejecting the plaintiff from his train when plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon and refused to pay fare, and he himself was ignorant of the transaction between the plaintiff and the conductor Sherman. It seems to us there was no other course for him to pursue under the rules of the company, for he was certainly not bound to take the plaintiff's word that he had paid his fare, and that Sherman had made a mistake in not giving him a stop-over check.

It is apparent that the right of the plaintiff to ride on the train without a proper voucher, and the right of the second conductor to eject him for want of said voucher, were inconsistent rights, which could not co-exist at the same time. Therefore under the rule of the company the second conductor was clearly authorized and required to put the plaintiff off his train when he refused to pay fare, using no more violence than was necessary to accomplish his object; for the plaintiff had no right to remain on the train without a proper voucher, or producing some evidence showing he was entitled to carriage on that train without paying additional fare. Suppose the plaintiff had received from Sherman, when he surrendered his ticket, the proper stop-over check, but had lost it before he took the subsequent train; could he have insisted in that case upon riding on a train with another conductor without paying fare? It seems to us he could not. It would be the duty of the second conductor, in the case supposed, on his refusing to pay fare, to eject him from the train at some usual stopping place, using no unnecessary force. So here the plaintiff was not entitled, upon any thing he showed the second conductor, to ride on his train. That conductor therefore had the lawful right to eject him from it; nay, he was bound to do so in obedience to the reasonable rules of the company, which required a passenger to obtain from his conductor a stop-over check when he desired to stop before reaching the place to which he had purchased a ticket; and the mistake or fault of the conductor in not giving him on request such a check would not give him a lawful right to ride on the second train, though he might recover damages against the company for the wrongful act of the first conductor. *Townsend v. N. Y. C. & H.*

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R. Railroad, 56 N. Y. 295; s. c., 15 Am. Rep. 419; *Chicago, etc., Railroad Co. v. Griffin*, 68 Ill. 499.

The case of *Townsend v. Railroad*, *supra*, is quite in point on the question we are considering. There the plaintiff purchased a ticket at Sing Sing station for Rhinebeck, but took a train going no further north than Poughkeepsie. The conductor on the train called for tickets, and the plaintiff handed him his ticket, receiving back no check or other evidence showing a right to a passage on any other train of the defendant; nor did the plaintiff ask for a return of his ticket, or for any such evidence. He left the train at Poughkeepsie, where it stopped, and waited until another train arrived from New York going to Albany, which he took. After the train started "the conductor called upon him for his ticket, in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had not given back to him. Some of the passengers told the conductor that the plaintiff had such a ticket. The conductor told the plaintiff that it was his duty, in case he had no ticket, to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff still refusing to pay fare or to leave the train upon request, was taken hold of, and such force used as was necessary to overcome his resistance, and ejected from the car." The court held that he was lawfully put off the train, notwithstanding the wrongful act of the previous conductor in taking his ticket. The case is well considered, and the opinion of Judge GROVER is very instructive. Substantially the same doctrine as to the rights and duties of passengers and carriers is laid down in *Shelton v. Railway Co.*, 29 Ohio St. 214; *Downs v. Railroad Co.*, 36 Conn. 287; s. c., 4 Am. Rep. 77; and *McClure v. Railroad Co.*, 34 Md. 532; s. c., 6 Am. Rep. 345. The cases of *Toledo, W. & W. Railway Co. v. McDonough*, 53 Ind. 289; *Burnham v. Railway Co.*, 63 Me. 298; s. c., 18 Am. Rep. 220; *Palmer v. Railroad*, 3 Rich. 580; *Hamilton v. Railroad Co.*, 53 N. Y. 25; and *English v. Canal Co.*, 66 id. 454; s. c., 23 Am. Rep. 69, are clearly distinguishable from the case before us.

Putting the plaintiff off the train then at Bear Creek

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station was not an unlawful act. It was what the second conductor was bound to do in the discharge of his duty to the company. It is true, as a consequence of being ejected at that place at that time in the night he contracted a violent cold and became sick. But this exposure he really brought upon himself by his own conduct. Why then should he complain about it? He was distinctly told at Clintonville that he could not ride on the train unless he paid his fare. He had an ample opportunity to leave the train at that place. But he persistently refused either to leave the train or pay his fare, preferring to take his chances upon being put off at some subsequent station. He was told by the conductor that he would be put off at the next station unless he paid his fare. He might not have been familiar with the surroundings at Bear Creek station, but he certainly knew he would be put off, probably in the night time. The weather was cold, and he was liable to be exposed on leaving the train. All these things he knew or should have known, but he chose to remain on the train and abide the consequences. Under the circumstances he ought not to recover damages for any exposure or sickness which he brought upon himself by his own foolish and perverse conduct. For as we have said he was not entitled to a passage on that train, and was rightfully removed therefrom.

We are not called upon on this appeal to determine definitely what damages the plaintiff is entitled to recover for the wrongful act of the first conductor. It will be time to consider that question when it shall properly arise. We now only intend to decide that the charge of the County Court before referred to, which directed the jury, in the event they found in favor of the plaintiff, that they should assess damages for injuries arising from sickness, exposure or bodily suffering, which resulted from his being justly expelled from the train at Bear Creek station, was erroneous. For the reasons given the plaintiff was not entitled to recover any damages on that ground. The other exceptions taken to instructions given, or refusals to give instructions, need not be considered.

By the Court.—The judgment of the County Court is reversed, and a new trial ordered.

Judgment reversed.

Tetz v. Butterfield.

TETZ V. BUTTERFIELD.

(54 Wls. 243.)

Contract — architect's certificate — bad faith.

Where a building contract provides for the acceptance of the architect, evidence is admissible to show that he acted collusively and in bad faith.

ACTION for balance on a building contract, which provided for the acceptance of the work by the architect, Davelaar. The answer alleged that the work was unskillfully done, and improper materials were used to his knowledge, and that his acceptance was collusive and fraudulent. Evidence to this effect was excluded. The plaintiff had judgment below.

Geo. B. Goodwin, for appellant.

Austin & Kunkel, for respondent.

TAYLOR, J. The material questions to be determined upon this appeal are, first, whether under the contract in the absence of any proof of fraud, mistake or unfair dealing on the part of the architect, Davelaar, his acceptance of the work as completed in accordance with the terms of the contract would bind the defendant; and second, whether the answer sets up facts which would entitle the defendant to show that although there had been an acceptance of the work by the architect, such acceptance was not in good faith, but in fraud of the defendant's rights.

[Omitting the first question.]

Upon the second point we are all of the opinion that the matters set out in the answer were sufficient to authorize the defendant to show there had been either fraud, collusion or bad faith on the part of the architect in accepting the work; and that if he had been able to establish by his evidence the facts set out in his answer, such evidence would have tended to establish at least bad faith on the part of the architect, and so would have avoided the conclusive effect of his acceptance of the work. If the defendant could have shown by his evidence that the plaintiff put rotten materials in the floors and roof of said building, where the contract required him to put in good, sound timber and materials, or that he had done other things alleged in the answer in direct con-

travention of the requirements of the contract, and that notwithstanding such facts the architect had accepted the work, after being informed of the facts by the defendant, and against his objection, it seems to us that it would be competent evidence to go to the jury on the question of the bad faith of the architect in accepting the same.

In the case of *Hudson v. McCartney*, 33 Wis. 331, the late Chief Justice DIXON says: "Neither do we think the case was one where the jury should have been permitted to go into evidence of the manner in which the work was executed, for the purpose of impeaching the decision of the superintendent;" but he adds: "If fraud in the arbiter can ever be established by proof that he refused to certify the execution of the work when the same had been duly and properly performed, it can only be in those cases where the refusal is shown to have been grossly and palpably perverse, oppressive and unjust — so much so that the inference of bad faith and dishonesty would at once arise when the facts are known." The evidence offered by the defendant in this case if given would have tended to prove such a state of facts as would at least have justified an inference of bad faith on the part of the architect in accepting the work. Knowingly accepting unsound and rotten materials, where the contract called for sound materials, would certainly tend to prove bad faith; and if the evidence had shown that he had permitted large quantities of such material to be used, when the contract called for sound and perfect materials, it would be almost conclusive evidence of that fact. Proof that a few pieces of imperfect material had been used, or that in some slight matters the workmanship had not been in strict accordance with the terms of the contract and specifications would not be sufficient to avoid the acceptance of the work by the architect, nor establish bad faith on his part; but it seems to us if the defendant had proved all the matters set out in his answer to their full extent it would have shown such a want of faithfulness on the part of the architect as should render his acts ineffectual to bind the defendant. We think the court erred in excluding the evidence offered by the defendant, and for that error the judgment must be reversed.

By the Court.—The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

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BALLOU V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(54 Wis. 250.)

Master and servant — negligence — railroad receiving unsafe car from another.

A railroad company, receiving a loaded car from another company to be run over its road, is not bound to test the safety of the car for its servants, but may assume its safety unless the contrary appears. (*See note, p. 38.*)

ACTION of damages for negligence causing death. The negligence complained of was the imperfect fastening of a ladder on a freight car, by means of which the decedent was thrown to the track, run over and killed. The car was a loaded one, received by the defendant from another railroad to be run over its road. The defect was not apparent except on close inspection. The plaintiff was non-suited.

Gabe Bouck, for appellant.

William F. Vilas and *C. W. Felker*, of counsel, for respondent.

CASSODAY, J. The gist of the complaint is, that the intestate came to his death by the wrongful act, negligence and default of the defendant, and without any fault, carelessness or negligence on his part. The cause of action accrued prior to the repeal of section 1816, R. S., and was expressly saved by the repealing act (chapter 232, Laws of 1880), and hence must be governed by that section. The intestate was at the time he was killed a servant of the defendant, and the only question to be determined is, whether his death was caused by reason of the negligence of any other agent or servant of the defendant without contributory negligence on the part of the deceased. *Gumz v. Railway Co.*, 52 Wis. 676. Clearly, under that section, the burden was upon the plaintiff of proving that such death was by reason of the negligence of some "other agent or servant" of the defendant. There is no claim of any negligence on the part of the conductor of the train. There is no claim that the engineer was negligent in starting the engine and car, and running them in manner and with the speed he did. On the contrary the evidence is undisputed that he started them in pursuance of the signal and command of the deceased. Manifestly the only defect which at all contributed to the injury was the shortness of the

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bolt fastening the slat or round in question to the standard or stanchion.

Was the defendant guilty of negligence by taking that car loaded with charcoal from another railroad and handling it as it did? A very careful reading and re-reading of the printed case forces upon us the conviction that the learned Circuit judge's summary of the evidence above given, as to the defendant's negligence, is substantially correct.

[Omitting details of evidence.]

Had the conductor, or any other agent or servant of the defendant, prior to the injury, known of the shortness of the bolt, and the condition of that part of the stanchion directly under the slat or round, as they were revealed on examination after it came off, then such use after such knowledge would have been negligence within the meaning of the statute; and in such case, if the deceased was free from contributory negligence, there would be no question but that the plaintiff could recover. But the evidence fails to show that any agent or servant of the defendant had any such knowledge, or any knowledge of any condition of the ladder or car, perceivable to the eye, which would naturally induce a man of ordinary skill in such matters, in the exercise of ordinary care, to discover the precise defect which led to the injury. Of course it was discoverable by taking out the bolts and looking beneath the slats or rounds. So the sufficiency of the bolts as to length as well as size might have been determined by the application of a heavy weight, or by a strong man, or some machine, wrenching the same. Assuming that some such test should have been applied, the questions would remain, when, by whom, and how frequently? If properly tested by the manufacturer, then is it to be repeated by the purchaser and every one who uses the same? and if so, shall he go beyond ordinary inspection, while at rest or in use, to the extent of unmaking what has already been made?

There is much propriety in the law exacting rigid tests to the different parts in the first instance, and while a car is in the process of manufacture, which would be impracticable, if not impossible, to repeat every time a loaded car passed from one railway company to another. Is one railroad company, receiving a loaded car from another railroad company, bound to assume that such car was not properly made, that the materials used in its construction were unsuitable or defective, that the workmanship was unskillful? Or

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may the company so receiving properly assume that such loaded car was skillfully made of suitable materials, and that all the requisite tests in the manufacture of such car had been applied? Is the company so receiving bound not only to use such care as is required of those handling and drawing such car, but also such care as is required of the manufacturer in the selection of materials, the application of tests, and the exercise of skill in the building? May not the company so receiving such loaded car, and without being chargeable with negligence, assume that all parts of such car, which appear to be in good condition, are in such condition? Is the law so exacting as to the management of railroad trains as to impute negligence in not discovering what ordinary care would fail to detect? Is the law so stringent in such a case as to infer negligence without any omission of duty? Reference to the authorities may aid us in the solution of some of these questions.

In *Wedgwood v. Railway Co.*, 41 Wis. 478, the brakeman was injured while coupling freight cars, by a large and long bolt being out of place, and as alleged, unnecessarily projecting. It was there held that "a master is liable for injuries suffered by his servant, where by his own negligence or malfeasance he has enhanced the risk to which the servant was exposed beyond the natural risk of the employment, or has knowingly, and without informing the servant, used defective machinery which has caused the injury." On a subsequent appeal of the same case, it was held in effect, that such projection of the bolt, if a defect, was an obvious one, readily detected by inspection, and hence that negligence might be inferred without the plaintiff proving that the defendant had actual notice of such defect. In this respect the case was clearly distinguishable from the one before us.

In *Smith v. Railway Co.*, 42 Wis. 520, the brake-staff or rod on a wood train broke just below the cog-wheel, near the top of the car, on account of an old crack or seam in the same, in consequence of which the plaintiff, who was brakeman on the train, was thrown upon the track and suffered severe injuries. The plaintiff in that case obtained a special verdict and judgment in his favor; but it was reversed "for the reason that there was no evidence which warranted the jury in finding that the defendant was guilty of negligence in not applying a proper and sufficient test to the brake-rod," notwithstanding the jury did find "that the defendant by the exercise of ordinary care, skill and diligence might

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have known of the defect," though it did not. It did not appear whether the car with the defective rod had been purchased by the company or manufactured in its shops. "It was a new flat car which had been taken into the train but two or three days prior to the accident, and appeared to be a good car." It appeared that the company applied the ordinary tests in manufacturing cars, and the ordinary inspection on the purchase of cars. But the opinion states that apparently, "the defect in the brake-rod was a latent one, which would not likely be detected or discovered by the usual examination or inspection of the car," and that "it would undoubtedly be impracticable to apply tests to every brake-rod which is used upon defendant's cars, and if compatible with the nature of the business would be of doubtful utility. There should be at least some testimony tending to show that the tests applied to determine the sufficiency of the brake-rod were inadequate, and not in accordance with the most approved methods to justify the finding of the jury." Page 525. Again the court said: "The servant then takes the risks of the employment, and of a failure of the machinery from any latent defect not discovered by practical tests." Page 526. Such was the language of this court as to the degree of care requisite in a railroad company using cars manufactured or purchased by the company so using the same. Certainly the rule cannot be less favorable to a railway company which neither manufactured nor purchased the defective car, but merely received it, loaded with charcoal, from another company, for the simple purpose of drawing it to the place of consignment and then returning the empty car.

In *Morrison v. Construction Co.*, 44 Wis. 405, the injury was caused by the breaking of a wheel under a freight car in the train, which threw the car containing the plaintiff's horses from the track. The track was in good order; the wheel had been used only a short time, and upon inspection after the accident showed no flaw or defect; and there was no evidence, except the mere fact of its breaking, which tended to show negligence of the company, and it was "held there was no error in directing a verdict for the defendant." It is true the liability of the defendant in that case was limited by the contract of carriage, but that does not render the decision inapplicable, because it was made to "turn and be determined upon the question whether the defendant was careless, negligent or in fault in producing the injury complained of." Page 409.

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In *Steffen v. Railway Co.*, 46 Wis. 265, the late chief justice said: "There may be latent risks in an employment. Where these are known to the master it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In *E. St. L. P. & P. Co. v. Hightower*, 92 Ill. 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury, received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge, or might have had knowledge of the defect by the use of reasonable diligence." *I., B. & W. Railway Co. v. Toy*, 91 Ill. 474.

In *De Graf v. Railroad Co.*, 76 N. Y. 125, the brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake-chains to see if they were in their place and apparently sound, but did not test their strength." The court however from all the evidence, "held that the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that it could have been discovered by the exercise of ordinary care, or that such care was not used; and that therefore a refusal to nonsuit was error."

In *Warner v. Railway Co.*, 39 N. Y. 468, the plaintiff was injured by reason of the fall of a defective railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the railway company was not liable. Thus the authorities seem pretty clearly to establish the rule that where the injury is the result of a latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care, such master will not be held liable. Here as we have noticed the car having the defective ladder was not manufactured by, and did not belong to the defendant. It may be that the ladder was not constructed in the most approved method.

In *Baldwin v. Railway*, 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads,

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“in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employee assumes in undertaking the employment.” In such case it would seem upon principle that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Railroad*, 20 Mich. 105. Certainly a railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. W., I. & S. R. R. Co. v. Gildersleeve*, 33 Mich. 133. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon inter-State commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employee, and the result of the neglect of that ordinary and reasonable care and diligence in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *M. R. & L. E. Railroad Co. v. Barber*, 5 Ohio St. 541.

It appears from the testimony that the ladder in question was almost in constant use, not by the engineer, nor so much by the conductor, but by the brakeman. The straining test was necessarily applied whenever the brakeman ascended or descended the ladder in question. Such constant use was necessarily by men having eyes, and hence when the car was in use the ladder must have received frequent inspection. The defendant company could only inspect and test by the agency of some employee present at the ladder. The brakeman was such employee, and apparently the only one having, at the time in question, charge of the brake on the car, as he had frequently had before, and necessarily tested and inspected the ladder the insufficiency of which is now complained of. His inspection and testing was the company's inspection and testing. His failure to discover any visible indications of insufficiency, while so inspecting and testing, was no more culpable in the com-

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pany than in himself. Is it logical to hold that in such practical testing and inspection his failure to notice visible indications of insufficiency was the exercise of ordinary care, and yet that the invisible entity known as the corporation, looking through his eyes, and using his feet and hands, as much as any other servant of the company, was guilty of negligence in omitting to detect and guard against what he failed to discover? Was the insufficiency of the ladder latent as to the brakeman using the same, but patent as to the company for whom he so used it? Or can it be said that the company was in the exercise of ordinary care so far as inspecting and testing by its brakeman present at the ladder was concerned, but negligent by reason of the failure of some unnamed servant not present to apply some unnamed test?

These brakemen, to use the language of RYAN, C. J., in *Steffen v. Railway Co.*, *supra*, "appears to have been employed to perform this very duty. * * * at the *locus in quo*." Is the standard of ordinary care of the corporation acting through the brakeman, on the part of the company, so much more stringent than on the part of the brakeman acting for himself, and in view of his own personal safety and life? In the Ohio case cited the conductor sued the company for injuries sustained by reason of defective cars, but he was "held to ordinary and reasonable care and diligence, not only in the management of the train, but also in the due inspection of the cars, machinery and apparatus of the train, as to their sufficiency and safety." Of course the company is required to use proper care in furnishing safe and sufficient cars and machinery for the train, but that does not relieve the employee from the exercise of ordinary care. Whether ordinary care requires such employee to inspect or test the part of the car or machinery, which so turns out to be defective, would seem to depend very much upon the character of the particular employment, and his relation to and connection with such defective part prior to the injury. It has frequently been held that "an employee who has knowledge of defects in machinery about which he is employed, or who might know them by the exercise of reasonable care, cannot maintain an action for injuries resulting therefrom, if he continues in the employment without objection." *Way v. Railroad Co.*, 40 Iowa, 341; *Kroy v. Railroad Co.*, 32 id. 357; *McGlynn v. Brodie*, 31 Cal. 376; *Devitt v. Pacific Railroad Co.*, 50 Mo. 302; *Dillon v.*

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Railroad Co., 3 Dill. 320 ; *Sullivan v. India Manuf'g Co.*, 113 Mass. 396; *T. W. & W. R. R. Co. v. Black*, 88 Ill. 112.

In *Hayden v. Smithville Man. Co.*, 29 Conn. 548, it was held that "an employee cannot recover for an injury suffered in the course of his employment from a defect in the machinery used by his employer, unless the employer knew or ought to have known of the defect, and the employee did not know of it or had not equal means of knowledge." The fairness of such a rule cannot well be questioned, as it places both parties upon an equality; and it is not materially different from the rule frequently recognized by this court. *Dorsey v. Construction Co.*, 42 Wis. 583 ; *Flannagan v. Railway Co.*, 45 id. 98; s. c., 50 id. 462. See also *Clark v. Railroad Co.*, 2 Am. & Eng. Railroad Cas. 240; *Smith v. Potter*, 9 N. W. Rep. 273.

Beyond question the fastening of the slat or round was insufficient, and was culpable negligence on the part of the person or corporation under whose supervision it was so fastened; but since it was in apparent good condition, we do not think the defendant receiving the car loaded for transportation and handling it is guilty of the neglect of another to one of its servants in the habit of handling the same car, and having the same knowledge and means of knowledge as the defendant. Besides we are to remember that at the time of the injury the slat or round in question must have received an unusually severe strain from the swinging, wrenching method which the deceased adopted to board the car, which boarding at the time was purely a matter of his own choice, and without necessity.

For the reasons given the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

TAYLOR, J., dissented.

NOTE BY THE REPORTER.—A like ruling was made in *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212. There the defect was the employment of double dead-woods. The court said: "But if it be conceded the double dead-woods are so dangerous, the concession does not dispose of this case. This is a question of negligence. The charge is that defendant has been guilty of a breach of duty to one of its servants in permitting the cars of the New York, Lake Erie & Western Railroad to come upon his own road, and to be handled and coupled by its switchmen, without warning them of the peculiar construction, and without furnishing them with appliances to make the coupling safe. There is no dispute regarding the main facts bearing upon this question. The company owning these cars have many thousands of them in use, and probably several hundred are coupled together every day. No doubt accidents sometimes occur, for the act of coupling cars of any pattern is always hazardous; but the evidence of persons having actual knowledge does not show that they are more frequent on that road than on others. When a witness testifies from

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mere inspection, as one does, that the chances of injury are greater than the chances of escape, we have a right, and indeed are compelled, to receive his opinion with many allowances, and to suspect that he has either misspoken or used words without fully apprehending their meaning. If this opinion even distantly approached the truth, a single day's destruction of life and limb from the use of these cars would startle the country, and be surely followed by desertion of laborers and quite as surely by prohibitory legislation. Any form of car a railroad company may select for use must be one that with care can be coupled safely, or the company could not afford to operate its road by means of them. With needless exposure of its men to danger by the use of unsuitable cars, the company would inevitably subject itself to public odium and disfavor; casualties to property would be increased, and if it could succeed in manning its road with laborers, it must pay them wages increased by the risks of danger. These are patent facts, and they justify an inference when a particular form of car is deliberately chosen and adhered to, that it is believed by those who make use of it to be as safe as any other. It is no doubt true that a company may make serious mistakes in such a case. It is quite possible for a company to adhere unreasonably to something which has been thoroughly demonstrated to be dangerous; and the mere fact that it does so cannot be conclusive in its favor of the want of negligence. But on the other hand no railroad company, and no manufacturing or business establishment of any kind, is bound at its peril to make use only of the best implements, the best machinery and the safest methods. The State does not require it, and could not require it, without keeping such minute and constant supervision of private affairs, and interfering with such frequency as under all circumstances would be irritating and damaging, and in many cases would become intolerable. In the main the State must leave every man to manage his own business in his own way. If his way is not the best, but nevertheless others, with a full knowledge of what his way is, see fit to co-operate with him in it, the State cannot interfere to prevent, nor punish him in damages when the risks his servants voluntarily assume are followed by injuries. *Hulett v. St. Louis, etc., R. R. Co.*, 67 Mo. 240; *Lovejoy v. Boston, etc., R. R. Co.*, 125 Mass. 79; s. c., 28 Am. Rep. 303.

"But it is said that even if it be not negligence in another company to use these cars, it is negligence in defendant to receive them among other cars, and to send its switchmen to make up trains with them without giving them notice of the difference. The desirability of notice is manifest, but how it is to be given is not so plain. It appears that the company inspects every car offered to it by another for transportation, and marks for rejection all that are considered unsafe, and sets them aside; and it is said that the company should mark in the same or some similar way all the cars which do not couple like its own, and then brakemen would be put upon their guard. As coupling is required to be done at all hours of the day or night at all points on defendant's line, and often under circumstances of great haste, the marking would need to be something the switchman would instantly perceive without groping about for it, and in respect to which there could be no confusion and no mistake. The best marking might perhaps be a placard of some sort at the end of each car, where it would readily attract the attention of the coupler; and as there are several different kinds of car, so there would need to be as many different placards. The differences in these would be confusing and likely to lead to mistakes. But we have had produced for our inspection, on the argument, a model of the double dead-woods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the difference from those belonging to the defendants, than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double dead-woods, or to approach them for the purpose, with any degree of attention, without observing it. This is so whether the coupling is done in the day-time or night-time; for in the night every switchman has his lantern with him, or should have it on all occasions. If therefore a switchman were to declare that he had attempted to couple the double dead-woods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him.

"Moreover the business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen.

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The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume as he passes from one to another that the two will be alike; much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the notice than before; and a man who would not heed the information the very nature and course of the business would impart to him, would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it."

"The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose and which are upon wheels adapted to its gauge. It is compelled to do so. *First*, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expenses increased, injuries to freight made more numerous, and no corresponding advantage accrue to any one. It is compelled to do so, *second*, by its own interest. To attempt to stop every car offered to it at its own *termini*, that the freight might be transferred to its own vehicles would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business for which it must increase its charges to make up if possible for what it would lose. But *third*, the statute itself requires it. It is provided by General Laws 1873, p. 90, that 'every corporation owning a road in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation.' The necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish could hardly fail to be speedy and effectual."

To the same effect, *Smith v. Flint, etc., Ry.*, 48 Mich. 258. The same court in *Foley v. Chicago, etc., Ry. Co.*, June, 1882, held similar doctrine. This was an action for negligence causing the death of the plaintiff's intestate, a switchman in the defendant's employ. The deceased had been sent by the defendant to switch a car owned by another railroad company, to be loaded with nitro-glycerine by the servants of that company. Owing to the negligence of those servants there was a fatal explosion. The plaintiff contended that the defendant was negligent in not notifying the deceased of the danger into which they sent him. The defendant had judgment and this was affirmed, the court observing: "The question then seems to be this: Whether defendant, in complying with a proper request from another railroad company to run for it a short distance one of its cars, to be loaded with an article which was safe when properly handled, but exceedingly dangerous when carelessly handled, was bound to assume that negligence on the part of those handling would occur, and bound to take measures for the protection of its servants on that assumption? And if this question shall be answered in the affirmative, the further question will be presented: What measures of protection could the defendant take short of absolute refusal to remove the car at all? The switchman knew what was to be loaded and had a general knowledge of its qualities; but more particular and specific information to him on that subject would have been entirely without value. He was not to handle the nitro-glycerine, and he could exercise no control over the action of those who were. Caution from him on the subject would not be likely to receive attention from the men whose business it was, and who handled it constantly. The only caution to decedent which could have been of the least service would be the caution to keep away altogether. If he was entitled to this, it necessarily follows that defendant should have refused altogether to move the car over its track. But it was not claimed on the argument that this could have been properly or even lawfully done."

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On the other hand : In *O'Neil v. St. Louis Iron Mountain and Southern Ry. Co.*, 9 Fed. Rep. 387, it was held by TREAR, D. J., in the Federal Circuit of the Eastern District of Missouri, that where an accident occurs to an employee of a railroad company in consequence of the introduction of a foreign and defectively constructed car into the train on which he is employed, he may maintain an action of damages against the company therefor. The court said : " It is of great importance to hold employees on railroad trains to the fullest measure of duty, for on their skill and fidelity life and property depend ; and it is equally important for their protection that their employers shall furnish them with reasonably adequate and safe appliances whereby they can perform their duties with safety to themselves and to the lives and property at stake. To relax the rules so that the employer may escape liability, would be as detrimental to public interests as if the rules by which the employee is to be governed were to be relaxed in favor of the latter. An employee, as charged in this case, must be supposed to know the nature of the employment, and to possess the skill and diligence requisite for the proper discharge of his duties. He takes the hazard of the employment. Still if the employer introduces without notice to the employee some new and unusual machinery involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident like that in question, it is not unreasonable to hold that the employer should answer therefor in damages."

BROWN V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(54 Wis. 342.)

Damages — remoteness — action of tort.

A pregnant woman, passenger on a railway train, was carelessly directed by the brakeman to leave the train at a station three miles short of her destination. This was on a cloudy night, she could not see the station, and being a stranger there, she walked until she reached her destination. This exertion brought on a miscarriage and sickness. *Held*, that the defendant was liable for this injury. (*See note*, p. 53.)

ACTION of damages for negligence resulting in personal injuries. The opinion states the case. The plaintiff had judgment below.

D. S. Wegg, for appellant.

J. W. Rusk, for respondent.

TAYLOR, J. Upon this appeal the learned counsel for the railway company insisted that the damages claimed for the sickness of the wife, and for her medical attendance and care, are too remote

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to constitute a cause of action, and that it was error on the part of the court below not to take that part of the case from the jury.

[Omitting a discussion of the form of action. It was held to be tort.]

The plaintiffs claim, and the evidence shows that they and their child, about seven years old, were directed to leave the cars by the brakeman, at a place some three miles east of Mauston, being told at the time that it was Mauston, their place of destination. When they left the cars it was night; it was cloudy, and had rained the day before; there was a freight train standing on a side track where they were put off the train; there was no platform, and no lights visible except those on the freight train. Plaintiffs soon ascertained that they were not at Mauston, and did not know where they were. They did not see the station-house, although there was one, but it was hid from their view by the freight train standing on the side track. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track toward Mauston, expecting to find a house where they might stop, but did not find one until they came to the bridge, about a mile east of Mauston, and then they thought it easier to go on to Mauston than seek shelter at the house, which was a considerable distance from the track. They went on to Mauston, and arrived there late at night, Mrs. Brown quite exhausted from the walk. She was pregnant at the time. She had severe pains during the night, and the pains continued from time to time, and after a few days she commenced flowing. The pains and flowing continued until some time in December, when a miscarriage took place, after which inflammation set in, and for some time she was so sick that she was in imminent danger of dying. The plaintiffs claim that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train.

The important question in the case is, whether the appellant is liable for the injury to Mrs. Brown, admitting that it was caused by her walk to Mauston. Whether the sickness of Mrs. Brown was caused by the walk to Mauston was an issue in the case, and the jury have found upon the evidence that it was caused by the walk. There is certainly some evidence to sustain this finding of the jury, and their finding is therefore conclusive upon this

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point. Admitting that the walk caused the miscarriage and sickness of the plaintiff, Mrs. Brown, it is insisted by the learned counsel for the appellant, that the appellant is not liable for such injury ; that it is too remote to be the subject of an action ; that the negligence and carelessness of the defendant's employees in putting the plaintiffs off the cars at the place they did was not the proximate cause of the miscarriage and sickness, and for that reason the appellant company is not liable therefor.

To sustain this position of the learned counsel for the appellant, reliance is placed upon the case of *Walsh v. Railway Co.*, 42 Wis. 23 ; s. c., 24 Am. Rep. 376, and it is insisted that there can be no real distinction made between that case and this. Upon a careful examination of that case, it will be seen, we think, that the court did distinguish between an action which was purely an action for a breach of contract, and one in tort. In that case the learned Circuit judge charged the jury as follows : "If you find that the failure to return to Madison on the day in question, at the time agreed upon in the contract, was caused directly by orders from the head-quarters and principal manager of the railway company, made with the full knowledge that the plaintiff and the other excursionists were ready and waiting to be carried home according to the arrangement made therefor, and made in willful disregard of the rights of the plaintiff and the other excursionists, subordinating their rights to the convenience of the company, when they had the means at hand readily to have fulfilled their duty — in short, that the conduct of the company was willful and oppressive — then you may give full compensatory, though not punitive, damages, embracing such loss of time, such injury to health, such annoyance and vexation of mind, and such mental distress and sense of wrong as you find were the immediate result of the misconduct, and must necessarily and reasonably have been expected to arise therefrom to the plaintiffs as one of the excursionists." This instruction was excepted to, and this court held the instruction erroneous, and reversed the judgment for that cause.

The present chief justice, who wrote the opinion in the case, takes special pains to show that the action was based solely upon a breach of contract, and was in no sense an action of tort, and he expressly declared that the rule of damages is not the same where the action is for a breach of contract as for a tort. Upon this

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point he uses the following language: "It will be seen that the Circuit Court was requested to charge that the plaintiff was only entitled to recover such damages as naturally and fairly resulted from the breach of contract, but could not recover damages for the disappointment of mind, sense of wrong, or injury to his feelings by reason of such breach. This rule the learned Circuit judge disaffirmed, holding that if the conduct of the company was willful and oppressive, then such injury to health, annoyance and vexation of mind, mental distress and sense of wrong, as were the immediate result of the misconduct and must reasonably have been expected to arise therefrom to the plaintiff, were proper matters to be considered in giving compensatory damages. This was confounding the important distinction, so far as the rule of damages is concerned, between an action in tort and one upon contract. It was in fact applying to this case the rule which was laid down in *Craker v. Railway Co.*, 36 Wis. 657; s. c., 17 Am. Rep. 504, in an action for a tort committed by an agent of the company. In the case of wrongs, the jury are permitted to consider injury to feeling and many other matters which have no place in questions of damages for a breach of contract."

The chief justice then quotes at large from the case of *Hobbs v. Railway Co.*, L. R., 10 Q. B. 111, with approval. In that case the English Court of Appeals held that when the railway company had neglected or refused to carry the plaintiffs to their destination, and they were compelled to get out at a station about five miles from it, late at night, and being unable to get a conveyance or accommodation at an inn, they walked home a distance of five miles in the rain, and the wife caught cold and was sick as a consequence of the walk and exposure, they could not recover for the injury to the wife. It would seem, from the opinions given by the learned judges in the *Hobbs* case, that they treated the action as an action upon contract, and not an action for a tort. All the judges speak of it as an action to recover for the breach of the contract to carry the plaintiffs to their destination.

The rule as to what damages may be recovered in actions for breach of contract, is laid down by this court in the case of *Candee v. W. U. Tel. Co.*, 34 Wis. 479; s. c., 17 Am. Rep. 452, cited from *Hadley v. Baxendale*, 9 Exch. 341, and approved. It is as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of

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such breach of contract should be either such as may fairly and substantially be considered as arising naturally — that is, according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”

The latter part of this rule, as above quoted, would seem to cover all cases of breach of contracts, for it must be presumed that the parties would reasonably be supposed to have contemplated that the party injured by the breach of the contract would sustain such damages as would fairly and substantially, in the usual course of things, result from such breach. And so it is often said that in an action for a breach of contract, the damages to be recovered are such as may reasonably be supposed to have been in the contemplation of both parties when they made it. Under this rule the damages which may be recovered in an action for the breach of a contract are sometimes more remote and far-reaching than those recoverable for a tort.

The case of *Richardson v. Chynoweth*, 26 Wis. 656, is an illustration of the rule. In that case the court say : “In such cases, where the contracting party is advised of the special purpose of the thing to be completed, and of the damage that would naturally accrue from failure to complete it at the specified time, and in view of this expressly stipulates to finish it at a given time, there is no reason why he should not be responsible for such damage as is the direct, natural result of his failure, even though beyond the mere difference between the contract and the market price.” See *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318 ; *Flick v. Weatherbee*, 20 id. 392.

In many cases of breach of contract the courts have by their decisions established a rule of damages which is applicable to all of a class. In an action for a breach of contract to pay money at a fixed time, the damages are the lawful interest on the money withheld from the time it was payable to the date of the judgment, unless the contract expressly stipulates for other damages. So in actions for a breach of a covenant of warranty of title, the damages are limited ordinarily to the purchase-money paid and interest. In these and other classes of cases the damages are fixed by arbitrary rules ; but still the general rule above stated, that the damages are such as “it may reasonably be supposed to have been contemplated

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that the party injured by the breach of the contract would sustain," would apply to such cases; for in contracts of the classes above mentioned, the parties would enter into them knowing the law fixing the damages for the breach, and so they would be supposed to have contemplated the payment of such damages in a case of breach and no other

In the case of *Hobbs v. Railway Co.*, *supra*, the learned justices state the rule in case of breach of contract in more concise language. They say: "Such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it." Under this rule it was held in the *Hobbs* case, and by this court in the *Walsh* case, that in an action for a breach of contract in failing to carry a passenger to its destination, damages could not be recovered for injury to the health, annoyance and vexation of mind and mental distress, on the ground that such damages were not such as the parties making the contract would contemplate as likely to result from its breach.

We are not disposed now to question the correctness of the decision made by this court in the case of *Walsh v. Railway Co.*, *supra*, limited, as that case was, to an action solely for a breach of contract. In such cases the willfulness of the party in refusing to fulfill the contract does not in any way change the rule of damages. The rule as to damages in actions upon contract is the same whether the breach be by mistake, pure accident, or inability to perform it, or whether it be willful and malicious. The motives of the party breaking the contract are not to be inquired into. 1 Sedg. Meas. Dam. 439 et seq., and cases cited.

The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is, that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedg. Meas. Dam. 130, note; *Eten v. Luyster*, 60 N. Y. 252; *Hill v. Winsor*, 118 Mass. 251; *Lane v. Atlantic Works*, 111 id. 136; *Keenan v. Cavanaugh*, 44 Vt. 268; *Little v. Railroad Corp.*, 66 Me. 239; *Collard v. Railway Co.*, 7 H. & N. 79; *Hart v. Railroad Co.*, 13 Met. 99, 104; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Metallic Compression Casting Co v. Railroad Co.*, 109 id. 277; *Salisbury v. Herchenroder*,

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106 id. 458 ; s. c., 12 Am. Rep. 689 ; *Perley v. Railroad Co.*, 98 Mass. 414 ; *Kellogg v. Railway Co.*, 26 Wis. 223 ; s. c., 7 Am. Rep. 69 ; *Patten v. Railway Co.*, 32 Wis. 524, and 36 id. 413 ; *Williams v. Vanderbilt*, 28 N. Y. 217 ; *Ward v. Vanderbilt*, 34 How. Pr., 144 ; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21. These cases, and many more which might be cited, clearly establish the doctrine that one who commits a trespass or other wrong is liable for all the damage which legitimately flows directly from such trespass or wrong, whether such damages might have been foreseen by the wrong-doer or not.

As stated by Justice COLT in the case of *Hill v. Winsor*, 118 Mass. 251 : “ It cannot be said, as a matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.”

In the case of *Bowas v. Pioneer Tow Line*, *supra*, Judge HOFFMAN, speaking of the rule in relation to damages on a breach of contract, as contrasted with the rule in case of wrongs, says : “ The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes when the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties, and may be recovered by the defendant. But this rule, as Mr. Sedgwick remarks, has no application to torts. He who commits a trespass must be held to contemplate all the damage which may legitimately flow from his illegal act, whether he may have foreseen them or not, and so far as it is plainly traceable, he must make compensation for it.”

The justice and propriety of this rule are manifest when applied to cases of direct injury to the person. If one man strike another with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual, can make no difference. If the wrong-doer should in fact intend but slight injury, and deal a blow which in ninety-nine cases in a hundred

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would result in a trifling injury, and yet by accident produce a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrong-doer from the consequences of his act. The real question in these cases is, did the wrongful act produce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the act of the party giving the blow is unlawful renders him liable for all its direct evil consequences.

This was the substance of the decision in the old and often cited squib case of *Scott v. Shepherd*, 2 W. Bl. 892. Justice NARES there says, that "the act of throwing the squib being unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate;" and in this view of the case all the judges agreed, although they differed upon the question as to the form of the action.

In the case at bar, the question to be determined is, whether the negligent act of the defendant's employees in putting the plaintiffs and their child off the train in the night-time, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote cause for which no action lies. We must, in considering this case, take it for granted that the walk from the place where they left the cars to Mauston was the immediate cause of the injury complained of. We think the question whether there was any negligence on the part of the plaintiffs in taking the walk was properly left to the jury as a question of fact; and they found that they were guilty of no negligence on their part. They found themselves placed by the wrongful act of the defendant where it became necessary for their protection to make the journey. The fact that there was a station-house near by, at which they might have found shelter until another train came by is not conclusive that the plaintiffs were negligent in the matter. They were landed at a place where they could not see it, and the jury have found that under the circumstances they were not guilty of negligence in not finding it. The defendant must therefore be held to have caused the plaintiffs to make the journey as the most prudent thing for them to do under the circumstances. And we think, under the rules of law, the defendant must be liable for the direct consequences of the journey. Had the defendant wrongfully placed the plaintiffs off

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the train in the open country, where there was no shelter, in a cold and stormy night, and on account of the state of health of the parties in their attempts to find shelter they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. The wrongful act of the defendant would be the natural and direct cause of their deaths, and it would seem to be a lame excuse for the defendant, that if the plaintiffs had been of more robust health, they would not have perished or have suffered any material injury.

The defendant is not excused because it did not know the state of health of Mrs. Brown, and is equally responsible for the consequences of the walk as though its employees had full knowledge of that fact. This court expressly so held in the case of *Stewart v. Ripon*, 38 Wis. 591, and substantially in the case of *Oliver v. Town of La Valle*, 36 id. 592.

Upon the findings of the jury in this case it appears that the defendant was guilty of a wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the defendants' wrongful act; and that on account of the peculiar state of health of Mrs. Brown at the time she was injured by such walk. There was no intervening independent cause of the injury other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think therefore it must be held that the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury within the decisions above quoted. We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act, or results from the act of the party in endeavoring to escape from the immediate danger.

When by the negligence of another a person is threatened with danger, and he attempts to escape such threatened danger by an act not culpable in itself under the circumstances, the person guilty of the negligence is liable for the injury received in such attempt to escape, even though no injury would have been sustained had

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there been no attempt to escape the threatened danger. This was so held, and we think properly, in the case of a passenger riding upon a stage coach, who, supposing the coach would be overturned, jumped therefrom and was injured, although the coach did not overturn, and would not have done so had the passenger remained in his seat. The passenger acted upon appearances, and not having acted negligently it was held that he could recover; it being shown that the coach was driven negligently at the time, which negligence produced the appearance of danger. *Jones v. Boyce*, 1 Stark. 493. The ground of the decision is very aptly and briefly stated by Lord ELLENBOROUGH in the case as follows: "If I place a man in such a situation that he must adopt a perilous alternative I am responsible for the consequences."

So in the case at bar the defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed they sustained injury. Such injury can be and is traced directly to the defendant's negligence as its cause; and it is its proximate cause, within the rules of law upon that subject. The true meaning of the maxim *causa proxima non remota spectatur* is probably as well defined by the late Chief Justice DIXON in the case of *Kellogg v. Railway Co.*, *supra*, as by any other judge or court. He states it as follows: "An efficient, adequate cause being found must be considered the true cause, unless some other cause not incident to it, but independent of it, is shown to have intervened between it and the result."

In the case of *M. & St. P. Railway Co. v. Kellogg*, 94 U.S. 475, the court say: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be, whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. * * * In the nature of things there is in

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every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

Within this definition the negligence of the defendant was the proximate cause of injury to Mrs. Brown, as there was no other cause, not incident to such negligence, which intervened to cause the same.

There is, I think, but one case cited by the learned counsel for the appellant which appears to be in direct conflict with this view of the case, except those which relate to breaches of contract, and that is the *Pullman Palace Car Co. v. Barker*, 4 Col. 344; s. c., 34 Am. Rep. 89. This case is, we think, unsustained by authority, and is in direct conflict with the decisions of this court in the cases of *Stewart v. Ripon*, and *Oliver v. Town of La Valle*, *supra*. This decision is, it seems to me, supported by the principles of neither law nor humanity. It in effect says that if an individual unlawfully compels a sick and enfeebled person to expose himself to the cold and storm to escape worse consequences from his wrongful act, he cannot recover damages from the wrong-doer, because it was his sick and enfeebled condition which rendered his exposure injurious. Certainly such a doctrine does not commend itself to those kinder feelings which are common to humanity, and I know of no other case which sustains its conclusions.

In the case of *Sharp v. Powell*, L. R., 7 C. P. 253, the defendant was not held liable in an action of tort under the following circumstances: He unlawfully washed a van in the street, and the water ran down the gutter toward a grating leading to the sewer. In consequence of the extreme cold weather the grating was obstructed with ice, so that the water could not escape, and so spread out and froze over the causeway, which was badly paved and rough, and there froze. The plaintiff's horse, while being led past the spot, slipped upon the ice, and was lamed. The action was brought to recover for the injury to the horse, and because it was shown that the defendant did not know that the grate was stopped so that the water could not escape, he was held not liable. This case comes within the rule above stated; there was an intervening and inde-

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pendent agency which caused the forming of the ice in the street, and the consequent injury, viz.: the frozen condition of the grate, of which he was ignorant, and for which he was in no way responsible.

The cases of *I., B. & W. Railway Co. v. Birney*, 71 Ill. 391, and *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7, were both cases similar to the one at bar; but both cases were decided in favor of the defendants, because it was held by the court that the plaintiffs, after being wrongfully left by the defendants short of their journey's end, were guilty of gross negligence in their manner of attempting to complete the journey, and so were not entitled to recover. I should say from the reasoning of the judges in both these cases that the judgment would have been for the plaintiffs, had there been no fault on their part, and had an injury occurred to them in prosecuting the journey not arising from their fault, or the fault of a third person.

In the case of *Phillips v. Dickerson*, 85 Ill. 11; s. c., 28 Am. Rep. 607, the defendant was doing no wrong to the plaintiff, and so far as the case shows was unconscious of her existence at the time. It was an exceptional case.

It would extend this opinion to too great length to undertake any review of the almost infinite number of cases in which the question of remote or proximate causes is discussed. No general and fixed rule can be laid down to govern all cases. It is said by the Supreme Court of the United States in *M. & St. P. Railway Co. v. Kellogg*, *supra*: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." And similar language was used by this court in the case of *Patton v. Railway Co.*, 32 Wis. 524-535. In that case the present chief justice says: "At all events we think the question was properly submitted to the jury to determine, whether under all the circumstances the failure of the company to have a light at the depot on the arrival of the train was the direct and proximate cause of the accident."

We think that all the objections made by the learned counsel for the appellant to the right of the plaintiffs to recover for the injury to the health of Mrs. Brown were overruled by this court in the cases of *Oliver v. Town of La Valle* and *Stewart v. Ripon*. In the *Oliver* case the injury complained of was like that in the case at

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bar. The only difference in the two cases is that in the *Oliver* case the evidence connecting the injury with the negligence of the defendant was more satisfactory than in the case at bar. But the question of the conclusiveness of the evidence is one for the jury, and they have settled that question in favor of the plaintiffs. In the *Oliver* case the negligence of the town caused the defendant's horses to fall through and get entangled in a bridge in the highway, which rendered it necessary that the plaintiff should make exertions to free the horses from their difficulty, and such exertions caused the injury complained of. It is the same in the case at bar, only not so plain in its circumstances. The negligence of the defendant put the plaintiffs in a situation which rendered it necessary for them to make an exertion to get out of such difficulty, and in doing so the plaintiff, Mrs. Brown, was injured the same as Mrs. Oliver in the other case.

The case of *Stewart v. Ripon* settles the other question that the peculiar condition of Mrs. Brown at the time is no defense to her claim for damages.

The objection made that the verdict should be set aside, because the evidence shows a want of care on the part of the defendants, and that the injury resulted from such want of care after the walk to Mauston, was clearly a question of fact for the jury. It does not appear from the record that any instruction upon this point was asked for by either party on the trial. There is therefore no error upon this point in the instruction. The evidence is not so clear that the damage was caused by the subsequent neglect of the plaintiff to procure proper medical attendance, as would justify this court in setting aside the verdict as against the evidence.

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

COLE, C. J., and LYON, J., dissent.

NOTE BY THE REPORTER.—We should not report this case, decided by a majority of one, were it not for the interest and importance of the question, and the frequency with which it has lately arisen. See note, 84 Am. Rep. 92; *Lange v. Wagner*, 32 Md. 810; s. c., 33 Am. Rep. 380, and note 382. In *McMahon v. Field*, 45 L. T. (N. S.) 881, English Court of Appeal, June 17, 1881, the plaintiff hired certain stables of the defendant, in order to put some horses there which he wished to dispose of at a fair held in the town. Soon after the horses arrived they were turned out of the stables in consequence of the defendant having also let the stables to another person, and as the defendant did not supply the plaintiff with other accommodation for the horses, the plaintiff was compelled to obtain it elsewhere. The plaintiff claimed damages for the breach of contract, and alleged that the horses were injured by being thus suddenly turned out of the stables and exposed to the weather while he was seeking other stables for them. The jury gave him 25l. for the

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loss consequent on his not having the use of the stables, and 50L. for the injury to the horses. *Held* (reversing the judgment of Fry, J.), that the plaintiff was entitled to the damages for the injury to the horses.

BRANWELL, L. J., said: "I find a difficulty in saying that the defendant is liable. It seems to me to be like the case of the cabinan (*Clayards v. Dethick*, 12 Q. B. 489), which has been referred to in the argument, where the action was held to be maintainable. I think that decision was wrong, for the criterion is not whether the plaintiff behaved reasonably. He may have behaved reasonably under the circumstances, just as it may be said that a man who leads a forlorn hope behaves reasonably. But in this case the plaintiff might have had the horses led about while he was looking for other stables for them, but he chose to leave them standing in the yard, and the result is that they caught cold. I think that if the question were left to my unassisted judgment I should come to the conclusion that the plaintiff was not entitled to these damages; but knowing that my learned brothers are of a different opinion I will not dissent from their judgment. I wish to say one word as to the case of *Hobbs v. London and S. W. R. Co.*, 32 L. T. (N. S.) 252; L. R., 10 Q. B. 111. I think that decision does not govern the present case. Suppose a person in the position of the plaintiffs in that case had put his foot in a hole in the dark and injured himself, I should doubt if he could not recover, and so if he caught a cold through having to walk home at night; but it would be otherwise if he were attacked and robbed by footpads on his way home. The question in all these cases is, was the mischief caused by the defendant's breach of contract? Here what happened could not have happened but for the breach of contract. Therefore I will not dissent from the judgment of the other members of the court, but agree that the appeal must be allowed."

BRETT, L. J., said: "Since the decision in *Hadley v. Baxendale*, 9 Exch. 341; 23 L. J. 179, Exch., the question whether danger is too remote has in my opinion been one of the greatest difficulty. According to the rule in *Hadley v. Baxendale* it must be considered, first, whether the damage was the necessary consequence of the breach of contract, and then whether it was the probable consequence, and then whether it might reasonably be in the contemplation of the parties. The last two questions are really matters of fact, but the courts have to decide them as questions of law. The question here is, did the fact of the horses catching cold come within any part of the rule? It was not the necessary consequence of the defendant's breach of contract, but I should certainly say that it was the probable consequence, if I had to decide the question, and I think it follows that it might reasonably have been in the contemplation of the parties. Here the jury found that the contract had been broken, and that the result of the breach was the damage which the plaintiff suffered. We are asked to say that this is unreasonable, and that the question ought not to have been left to the jury. Now let us consider the facts. * * * Any one who knew any thing about horses would have known that there was a great probability that they would catch cold. So far from thinking as matter of law that this is not a probable consequence, I am convinced as matter of fact that it is. Then there is the decision in *Hobbs v. London and S. W. R. Co.*, which it is contended governs this case. As to that decision I can only say that if I acquiesce in it I cannot bring my mind to agree with it. There a man took tickets for himself and his wife by a midnight train to Hampton Court; his house was two miles off from Hampton Court; he was taken to Esher, which was between four and five miles from his home; could get no conveyance, and he and his wife had to walk home at night in the rain; his wife caught cold, and the judge said that was not the natural consequence of the railway company's breach of contract. Why was the damage there too remote? Make the case of lodgings. Suppose the landlord turned his lodger out on a cold night in her nightgown; would it not be such a natural consequence as to make him liable if she were to catch cold? If he used the least force, and shedied, he would certainly be charged with manslaughter. If Esher were known to be a good station, and there had been accommodation at the station which the plaintiffs might have availed themselves of, it would have been their own fault if they had not done so; but there was no such accommodation at the station, they walked, and the wife caught cold. The judges, as a matter of fact and opinion, decided that this was so unnatural a consequence of the railway company's breach of contract that the question could not even be left to the jury. I confess I cannot bring my mind to the same conclusion. Here however there is a difference. People do walk home at night and not catch cold; it is not

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scarcely so inevitable a consequence as that horses should catch cold if turned out as these were. There is a difference between turning horses out at night after a hot journey and leaving people to walk home at night. Still *Hobbs v. London and S. W. R. Co.* is so near the line that in any other case, unless the circumstances were exactly the same, I should distinguish it. I am therefore of opinion that the appeal ought to be allowed, and in so deciding we are not overruling *Fay, J.*, except in mere form, for he only yielded to the decision of the Queen's Bench in *Hobbs v. London and S. W. R. Co.*, and his own opinion was that the plaintiff was entitled to these damages."

CORROD, L. J., said: "I am also of opinion that the plaintiff is entitled to recover. The jury have found that the cold which the plaintiff's horses caught was the result of their being turned out of the stable. It is said in *Hobbs v. London and S. W. R. Co.* that it is almost impossible to lay down a definite line as to remoteness of damage. BLACKBURN, J., says 'it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day.' The rule has been stated to be that the injury must be one that may fairly have been contemplated as the possible result of a breach of the contract. I cannot agree to that statement, for the parties to the contract do not contemplate a breach of it. I should rather say the question would be, is it a natural or probable result of the breach? It was said in *Hobbs v. London and S. W. R. Co.* that catching cold was an accident. In my opinion it cannot be called an accident in the sense to which I have referred. The question is, was this the probable result, without accident, of the defendant's breach of his contract? It seems to me that when the defendant broke his contract and turned the horses out it ought to have been in his contemplation that they might catch cold. It has been said that this result was attributable mainly to the horses standing without their clothing; but if that is so the servant of the defendant helped to turn them out, and for this the defendant would be responsible. I think the plaintiff's conduct was reasonable, as regards the defendant, in leaving the horses where they were, and not walking them about. I think therefore that this was the probable result of the defendant's breach of contract, for which he is answerable, as well as for the other damage which the plaintiff has suffered. The other lords justices have distinguished this case from *Hobbs v. London and S. W. R. Co.*, and therefore I will not minutely examine that decision; but it must not be taken that I agree with it. Perhaps, as a decision of fact, it may have been right, but I cannot say that the injury was not the probable consequence merely because other people might not catch cold if placed in the same position. The injury need not be a necessary consequence of the breach of contract."

In *Drake v. Kelly*, 93 Penn St. 493, a lad, two years of age, was forcibly put on board a freight train by the brakeman, and carried five miles against his will. He returned home on foot, running most of the way, and was taken sick and became permanently crippled in both legs. Held, that the court could not undertake to decide that the trespass had no connection with the plaintiff's sickness; nor that the latter was not the natural and probable consequence of the former. Nor that it was not such a consequence as under the circumstances might and ought to have been foreseen by the defendants as likely to flow from their conduct. These were necessarily questions for the jury. STREETER, J., said: "It was conceded that the plaintiff had sustained some injury, for which he was entitled to recover at least against one of the defendants, but it was denied that his sickness and subsequent suffering, in relation to which considerable testimony was introduced, was the result of the trespass. In other words, it was contended that the trespass was not the proximate cause of these injuries. This was the main question in the case, and in submitting it to the jury the learned judge instructed them that if the plaintiff's sickness was the direct result of the defendant's acts, 'that is if their acts, in connection with plaintiff's fright, excitement and exertion, in returning home, were the immediate cause of his sickness, he is entitled to recover damages as well for the injuries resulting from his sickness as from being put on the car and carried away. But he cannot recover for injuries resulting from his sickness, if his own conduct constituted negligence on his part which contributed in any degree to such sickness. What would be negligence in an adult might not be negligence in a boy ten years of age, and hence the jury, in passing on the question of negligence, must have regard to the age and intelligence of the plaintiff at the time the alleged injuries were received. If his sickness was not the direct result of

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the acts of the defendants—was the result of other causes, or if his negligence contributed to his sickness in any degree, then he could recover only such damages as he sustained by reason of having been forcibly put on the car and taken away ; that is to say, all damages he suffered prior to and independent of his sickness ; and these instructions will govern your verdict whether under our subsequent instructions you find against George Drake only or against both defendants.' The instruction thus given was both appropriate and adequate, and is here referred to at length for the purpose of showing how some of the detached sentences of the charge assigned for error are explained and qualified by the context. If the defendants below had desired other or more specific instructions on the subject, they should have preferred their request to the court. In *Hoag v. Railroad Co.*, 4 Norris, 298, our brother PAXSON says : ' The doctrine laid down in the *Railroad Co. v. Hope*, 80 Penn. St. 373 ; s. o., 21 Am. Rep. 100, and to be gathered incidentally perhaps from *Raydure v. Knight*, is that the question of proximate cause is to be decided by the jury upon all the facts in the case ; that they are to ascertain the relation of one fact to another, and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen and necessary result of such cause. * * * In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence ; such a consequence as under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act.' In view of the testimony in this case, the court could not undertake to decide that the trespass had no connection with the plaintiff's sickness ; that the latter was not the natural and probable consequence of the former. Nor that it was not such a consequence as under the circumstances might and ought to have been foreseen by the defendants as likely to flow from their conduct. These were necessarily questions for the jury. A child of tender years was forcibly seized, thrust into a car, locked up in a dark closet, and carried five miles from home, released late in the evening, and left to find his way home as best he could. Was it an unnatural or improbable result, that he should be excited, nervous, terrified ; that he should make his way home, if he could find it, with all possible speed, and without thought of consequences ? Was it at all unnatural or improbable, that the abuse, excitement and exposure would result in some form of illness, more or less severe ? And were not these such natural and probable consequences as might and ought to have been foreseen by those who committed the trespass ? If they were, it was not at all necessary that they might and ought to have foreseen the nature, severity or extent of such illness. To hold that this was essential would be requiring entirely too much in the interest of the wrong-doer. The actual results depend very much on the physical condition and constitutional tendencies of the person injured ; in some cases they might not be so serious, in others more serious, and even permanent, as in the present case. SHARSWOOD, C. J., MERCUR and PAXSON, JJ., dissented.

In *Scheffer v. Washington City, Virginia Midland and Great Southern R. R. Co.*, Supreme Court of the United States, May, 1882, it was held, that a railroad company is not liable for damages because of the death of one, who by reason of his sufferings from injuries caused by the negligence of the company's agents, has taken his own life. MILLER, J., said : " Two cases are cited by counsel, decided in this court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other ; and though relied on by plaintiffs in error, we think they both sustained the judgment of the Circuit Court. The first of these is that of *Ins. Co. v. Tweed*, 7 Wall. 44. In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur ' by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake or hurricane.' An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse—the one insured, situated across the street from the Marshall warehouse—and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The court said that no new or intervening cause occurred between the explosion and the

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burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote. This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found. In the case of *Milwaukee and St. Paul R. R. Co. v. Kellogg*, 94 U. S. 469, the sparks from a steam ferry-boat of the company had set fire to an elevator, and the sparks from the elevator had set fire to Kellogg's saw-mill and lumber-yard, which were from three to four hundred feet from the elevator. The court below was requested to charge the jury that the sparks from the steamboat as a cause of the fire of the mill and lumber was too remote. Instead of this, the court submitted to the jury to find 'whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circumstances would not naturally follow from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected.' The Supreme Court affirmed this ruling, and in commenting on the difficulty of ascertaining, in each case, the line between the proximate and remote causes of a wrong for which a remedy is sought, says: 'It is admitted that the rule is difficult. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' To the same effect is the language of the court in *McDonald v. Snelling*, 14 Allen, 294. Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity as a cause of his final destruction was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death."

In *Houston & Texas Cent. R. Co. v. Fredericks*, Texas Supreme Court, 1882, it was held that where a woman in delicate health applied at night to a railroad ticket agent at a station for a ticket, tendering the fare, and by the negligence of the agent was prevented from getting the ticket, and thereby from taking the train, the company is liable for all damages which might reasonably be expected to result from the negligence, such as walking several miles in order to stay for the night, sickness caused thereby, mental suffering, etc.

In *Murlock v. Boston and Albany Railroad Co.*, Massachusetts Supreme Court, 1882, an action of damages for breach of contract to carry the plaintiff as a passenger from Springfield to North Adams, it appeared that the plaintiff bought a ticket at Springfield, which entitled him to be carried to North Adams; that the defendant's conductor refused to receive the ticket, and when the train arrived at Pittsfield, the conductor, who was a railroad police officer, arrested the plaintiff for evading his fare and delivered him into the custody of two police officers of Pittsfield, who detained him during the night in the place of detention provided for arrested persons. The presiding judge ruled that the plaintiff was entitled to recover damages for this arrest and imprisonment, for indignities which the plaintiff claimed that he suffered at the hands of the Pittsfield police officers, for his mental suffering, and for sickness produced by a cold caught while confined. The court in review said: "The distinction between the rules of damages applicable in actions of contract and of tort appears to have been overlooked at the trial. We are of opinion that too broad a rule was adopted in this case. Damages for a breach of a contract are limited to such as are the natural and proximate consequences of the breach, such as may

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fairly be supposed to enter into the contemplation of the parties when they made the contract, and such as might naturally be expected to result from its violation. The detention of the plaintiff during the night, his discomforts in the place of detention, the cold which he took by the dampness of the cell, and the indignities he suffered from the police officers of Pittsfield, were not the immediate consequences of the breach of the defendant's contract to carry the plaintiff to North Adams. They were the results of intervening causes, not the primary but the secondary effects of the breach of contract, and are too remote to come within the rule of damages applicable in an action of contract. *Hobbs v. London and Southwestern Railway*, L. R., 10 Q. B. 111. The plaintiff's remedy for these wrongs, if proved, is by an action of tort. The defendant was not required to be ready to meet and contest these questions under a declaration alleging a breach of a contract to carry the plaintiff to North Adams."

LORD V. DEVENDORF.

(54 Wis. 491.)

Assignment for benefit of creditors — authority to sell on credit.

An assignment for the benefit of creditors directed that the assignee, "with all convenient diligence, sell or dispose of the property at public or private sale, as he may deem most beneficial to the interest of the creditors," "and convert the same into money." *Held*, not to authorize a sale on credit, and to be valid.*

ATACHMENT proceedings. The contest was between an assignee for the benefit of creditors, and attaching creditors. The opinion states the point. The attachment was vacated below

Bell & Murphy and *P. A. Orton*, for appellant.

Carter & Cleary, for respondent.

CASSODAY, J. In our opinion the assignment is not void upon its face by reason of the following clause: "shall, with all convenient diligence, sell and dispose of the same at public or private sale, as he may deem most beneficial to the interests of the creditors of said party of the first part, and convert the same into money."

In *Hutchinson v. Lord*, 1 Wis. 294, the particular words which rendered the assignment void were: "In such manner, either at public or private sale, and upon such terms and for such prices, as to the said party of the second part shall seem advisable;" and

* See *Brahnestadt v. McWhirter* (9 Neb. 6), 31 Am. Rep. 306, and note, 308.

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those which further expressly exempted the assignee from all liability, "*while acting in good faith.*" The court in that case put particular stress upon the words in italics.

In *Keep v. Sanderson*, 2 Wis. 42, the words which avoided the assignment were: "To sell and dispose of the assigned property *upon such terms and conditions* as in their judgment may appear best and most to the interest of the parties concerned."

In *Norton v. Kearney*, 10 Wis. 443, it was held that "an assignment in which the assignee is 'to dispose of the property to the best advantage, in his discretion,' is valid, and does not imply an authority to sell on credit." DIXON, C. J., distinguishing that case from *Hutchinson v. Lord* and *Keep v. Sanderson*, *supra*, said: "We are of the opinion that the discretion here vested must be understood as a legal discretion; that is, a discretion to be exercised within the limits which the law fixes in such cases. There is ample room for the exercise of this discretion without transcending any rule of law." The second case of *Keep v. Sanderson*, 12 Wis. 352, turned upon the same language as the first, and was decided the same way, and the opinion clearly distinguishes it from *Norton v. Kearney*. The above cases are harmonized by RYAN, C. J., in his dissenting opinion in *Bound v. Railroad Co.*, 45 Wis. 574, 575.

In the case before us there is nothing said about "terms and conditions," nor "prices," but the assignee is required to sell and dispose of the property and convert the same into money with all convenient diligence, and such sale and disposition is to be "at public or private sale," as he may deem most beneficial. The thing thus left to his discretion is, whether he will sell at *public* or *private sale*, and not whether he will sell for cash, or on credit or otherwise.

[Omitting minor matters.]

By the Court.—The order of the Circuit Court is affirmed.

Judgment affirmed.

STILLING v. TOWN OF THORP.

(54 Wis. 588.)

Evidence — scientific books.

Extracts from books proved to be "standard works in the medical profession" may not be read to the jury as evidence. (*See note, p. 61.*)

ACTION of damages for personal injury by negligence. The opinion states the point. The plaintiff had judgment below.

R. J. McBride and James O'Neill, for appellant.

H. H. Hayden and W. P. Bartlett, for respondent.

CASSODAY, J. [Omitting all other considerations.] The defendant examined a medical witness, and after proving by him that certain medical books shown him were standard works in his profession, offered to read extracts from them to the jury as evidence; but the offer was rejected, and the ruling is assigned as error.

In *Luning v. State*, 2 Pin. 215, it was held to be discretionary with the trial judge whether or not counsel shall be allowed in his *argument* to read to the jury medical or scientific works. See *Wade v. De Witt*, 20 Tex. 400; *Legg v. Drake*, 1 Ohio St. 286.

In *Ripon v. Bittel*, 30 Wis. 619, the court felt bound, under the peculiar condition of the record, to assume, in order to sustain the judgment, that the medical books had been admitted for the purpose of impeaching the evidence of a medical expert, who had given certain testimony as to their contents. To the same effect is *Conn. Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516. The inference from the opinion is, that they would not have been admissible as evidence for any other purpose. The precise question here presented is, whether a party can give in evidence extracts from standard medical works referred to by his own expert witness, for the purpose of corroborating such expert, and of increasing the weight to be given to his testimony.

In *State v. Hoyt*, 46 Conn. 337, the trial court refused to allow such extracts to be read by counsel as a part of his argument, and upon error being assigned, the cause was for that reason reversed by three of the five judges of the Supreme Court of that State. The opinion of the court however cites but one case in support of

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the decision, and that from the same State. Two of the judges dissented, and in support of their opinion, cited English, Massachusetts, Indiana, Texas and Wisconsin cases.

In *Ashworth v. Kittridge*, 12 Cush. 193, it was held that "medical books, even of received authority, are not competent evidence, if objected to by the adverse party." The reason given, in the terse opinion of Chief Justice SHAW, is that the written statements contained in such extracts are "wanting the sanction of an oath," and are "made by one not present, and not liable to cross-examination." See *Com. v. Wilson*, 1 Gray, 338.

In *Com. v. Sturtivant*, 117 Mass. 123; s. c., 19 Am. Rep. 401, it was held that "books on medical jurisprudence cannot be read by a witness to the jury, although the witness is an expert, and concurs in the views therein expressed." The only difference between that case and this is, that here the counsel instead of the witness, proposed to read the extracts. These cases are in harmony with our own judgment, as well as with the former decisions of this court on the subject. See discussions in 24 Alb. Law J. 266, 284; Whart. Ev., §§ 665-6; 1 Greenl. Ev., § 440, and note.

Judgment accordingly.

NOTE BY THE REPORTER.—On reading scientific books to the jury on the argument, see *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201; s. c., 38 Am. Rep. 573; and note, 538. *Cullier v. Simpson*, 5 C. & P. 73, was an action for words charging plaintiff with malpractice as a physician. It was proposed to show that certain prescriptions were proper and the doses not too large, and counsel offered to put in evidence medical books of authority to show what was the received opinion in the medical profession. TINDAL, C. J.: "I think cannot receive medical books." WIGHTMAN, J.: "When foreign laws are to be proved, it frequently happens that a witness produces a foreign law book, and states it to be a book of authority." TINDAL, C. J.: "Physic depends more on practice than law. I think you may ask a witness whether in the course of his reading he has found this laid down." "I do not think the books themselves can be read, but I do not see any objection to your asking Sir H. Halford his judgment and the grounds of it, which may be in some degree founded upon books as a part of his general knowledge."

Washburn v. Cuddy, 8 Gray, 430, was an action for breach of warranty on sale of a horse, the breach alleged being that the horse was addicted to the vice of "cribbiting." On the trial counsel undertook to read from Dodd's Veterinary Surgeon as to the nature of the habit, and as to whether it constituted a breach of the warranty, but was stopped by the court, which held such matter inadmissible. To the same effect, *Darby v. Ouseley*, H. & N. 121, and *Fowler v. Lewis*, 25 Tex. 380.

In *Whiton v. Insurance Co.*, 109 Mass. 24, counsel offered to read from Appleton's American Cyclopædia an article on the subject of guano in the islands of the Caribbean sea, to show the character and repute of the Island of Navassa as a guano island, but it was not permitted. The court say: "The defendants were also rightly refused permission to read to the jury an article in Appleton's Cyclopædia. A book published in this country by a private person is not competent evidence of facts stated therein of recent occurrence, and which might be proved by living witnesses, or other better evidence, and the book in question not being shown to have been approved by any public authority, or to

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be in general use among merchants or underwriters, has no tendency to show that the Island of Navassa was commonly called and known as a guano island "

In *Carter v. State*, 2 Ind. 617, the court held that while medical books are not admissible in evidence, medical men may give their opinions as witnesses, which opinions may in a measure be founded on standard medical books as a part of their general knowledge

In *State v. O'Brien*, 7 R. I. 336, the court said: "The book (Taylor's Medical Jurisprudence) offered to be read to the jury, was not admissible as evidence. No evidence in the nature of parol testimony could probably pass to them except under the sanction of an oath; and upon this ground, works of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and valuable as treatises. Scientific men are admitted to give their opinion as experts because given under oath; but the books which they write are, for want of such an oath, excluded."

In the very recent case in the Michigan Supreme Court, *Pinney v. Cahill*, an expert testified that he was supported in his opinion by all works of good authority, and that the "Modern Horse Doctor, by Dr. Dodd," was a work of that kind. The opposite party was then allowed to show from this work of Dr. Dodd, that it laid down different doctrines. GRAVES, J., says: "This evidence was offered to discredit this expert in connection with his cross examination. The rule is acknowledged in this State, that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in the veterinary science; to be familiar with the best books which treat of it, and among others, with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness stand, on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement on referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances, it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness, and to enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness, and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of." In *Cory v. Wilcox*, 6 Ind. 89, "Evan's Wheelwright's Guide" was permitted to be read to the jury by way of illustration merely, but the court charged the jury that "extracts read from a scientific work are not of authority, conclusively or *prima facie*."

In Iowa and Alabama such books are evidence by statute. In *Stoudenmeir v. Williamson*, 29 Ala. 558, the court say: "We think that medical authors whose books are admitted or proven to be standard works with that profession, ought to be received in evidence."

In a late California case, *People v. Wheeler*, the district attorney, under objection, was permitted on the argument to read to the jury extracts from Brown's "Medical Jurisprudence of Insanity." The book was not in evidence, nor was there any evidence that it was scientific, or of standard or recognized authority. *Held* error. The opinion reviews the authorities very exhaustively and critically, and the decision is put on the omission of evidence of the character of the book, but the court intimated that even if the authoritative character of the treatise had been shown, it would still have been error to read from it. They said: "The expert is called to assist the jury in reaching a just conclusion; his testimony is necessarily subject to the supervision of the jury. They must determine not only whether the hypothetical case on which his opinion is based is the case before them, as established by credible testimony, but must consider the reasons he has given for his opinions, and by his whole testimony test his credibility and the correctness of his judgment. Inasmuch as the circumstances on which the jury are to determine the weight to be given the opinion of an expert are more numerous and complicated than those by reference to which they are to decide on the consideration to be accorded to the statements of a witness with respect to facts and inferences involved, if any, which are within the reach of those possessed of no special or scientific acquirements, it follows that it is peculiarly important that a defendant charged with crime should be 'confronted' by the expert witnesses against him, and that they should be cross-examined in his presence. But where the opinions of a writer as to the presence or absence of insanity, upon facts more

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or less analogous to those claimed by the prosecution or defense to be established in the case, are permitted to go to the jury, the writer is not sworn or cross-examined at all. Such evidence is equally objectionable, whether introduced by the people or by the defendant. If held admissible, the question of insanity may be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories. In the case before us, too, there was no evidence that the work from which the district attorney read 'various' sections, was a standard authority in the medical profession, or that the author was an expert."

JEWELL v. CHICAGO, ST. PAUL AND MINNEAPOLIS RAILWAY COMPANY.

(54 Wis. 610.)

Negligence — contributory — leaving railway train under-way

A railway train not stopping at a station a reasonable length of time to allow passengers to alight, one undertook in spite of warnings to get off after the train had started, and was injured. *Held*, that she was guilty of contributory negligence fatal to recovery. (See note, p. 65.)

ACTION of damages for personal injury by negligence. The opinion and head-note show the case. The plaintiff had judgment below.

William E. Carter, for appellant.

L. P. Wetherby, N. H. Clapp and R. M. Bashford, for respondent.

CASSODAY, J. For the purposes of this appeal we assume that there is evidence sufficient to justify the jury in finding that the train did not stop in the first instance for a sufficient length of time to enable the plaintiff, in the exercise of due diligence, to get off the train with safety; notwithstanding the undisputed occurrences during the stoppage, as detailed by the plaintiff's own witnesses, would seem to demonstrate that a sufficient time did elapse while the train was at rest to enable the plaintiff to get off. Does the undisputed evidence show that the plaintiff was guilty of contributory negligence?

[Omitting a review of the evidence.]

We must conclude from the admitted facts, and facts established by evidence and circumstances not disputed, and which are of such a character as to preclude the possibility of the correct-

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ness of any contrary inference or statement, that the plaintiff not only went out of the car in which she was riding, onto the platform of the same, while the train was in motion, but that she also went down onto the steps, and from there stepped or jumped onto the depot platform while the train was in motion. The question therefore recurs, whether such conduct on her part was contributory negligence.

In *Railroad Co. v. Aspell*, 23 Penn. St. 147, it was held that "a passenger who has been negligently carried beyond a station where he intended to stop, and where he had a right to be let off, may recover compensation for the inconvenience, loss of time, and labor of travelling back; but where the plaintiff, under such circumstances, jumped off the car when in motion, though warned not to do so, it was held that he could not recover for the injury sustained."

In *Gavett v. Railroad Co.*, 16 Gray, 501, it was held that "a passenger in a railroad car who, knowing that the train is in motion, goes out of the car and steps upon the platform of the station while the train is still in motion, is so wanting in ordinary care as not to be entitled to maintain an action against the railroad corporation for an injury therefrom."

In *Hickey v. Railroad Co.*, 14 Allen, 429, it was held that "a traveller by railroad cannot maintain an action against a railroad company to recover damages for personal injury sustained by him in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger car while the train is in motion." See also *Nichols v. Railroad Co.*, 106 Mass. 463; *Harvey v. Railroad Co.*, 116 id. 269; *I. C. Railroad Co. v. Able*, 59 Ill. 131; *O. & M. Railroad Co. v. Schiebe*, 44 id. 460; *Burrows v. Railway Co.*, 63 N. Y. 556; *Morrison v. Railway Co.*, 56 id. 302; *Jeffersonville Railroad Co. v. Swift*, 26 Ind. 459; *B. & A. Railroad Co. v. Randolph*, 53 Ill. 510; s. c., 5 Am. Rep. 60; *I. C. Railroad Co. v. Stratton*, 54 Ill. 133; s. c., 5 Am. Rep. 109; *O. & M. Railway Co. v. Stratton*, 78 Ill. 88; *C. & N. W. Railway Co. v. Scates*, 90 id. 586.

In *Secor v. Railroad Co.*, 10 Fed. Rep. 15, a passenger on a train that had approached a station, and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when in consequence of the car being moved forward with a jerk he was thrown upon the platform and injured;

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and DRUMMOND, C. J., held that he was guilty of contributory negligence in attempting to alight from the train while it was in motion." *Bon v. Railway P. Ass. Co.*, 56 Iowa, 664; *L. S. & M. N. Railway Co. v. Kings*, 11 N. W. Rep. (Mich.) 276.

The cases cited are clearly in harmony with *Davis v. Railway Co.*, 18 Wis. 175. In the light of these authorities we must hold that even assuming that the train did not stop in the first instance a sufficient length of time to enable the plaintiff in the exercise of due diligence to get off the car in safety, yet as she passed out of the car and went down onto the steps of the car platform, and from thence stepped or jumped onto the depot platform while the train was in motion, contrary to the warning of the brakeman and bystanders who were present, she must be deemed guilty of negligence, which materially contributed to the injury complained of, and hence the seventh and ninth findings of the jury are not supported by the evidence.

[Omitting minor matters.]

By the Court.—The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Judgment reversed.

NOTE BY THE REPORTER.—See *Com. v. Boston and Maine Railroad*, 129 Mass. 500; s. c., 87 Am. Rep. 382, and note, 384; *Bon v. R'y Pass. Ass. Co.*, *post*.

In *Lake Shore, etc., Ry. Co. v. Bangs*, *supra*, it was held that it is negligent in a passenger to leap from a train moving six miles an hour, for the purpose of getting off at a station where the train should but does not stop, although he does so to save anxiety to his mother who is expecting him, and although others have frequently jumped off trains going at that rate of speed. The court said: "We have reluctantly felt ourselves compelled to hold that in our judgment such conduct is beyond any question negligence, and that the jury should have been so instructed. The fact that many persons take the risk of leaving cars in motion does not make them any the less risks which they have no right to lay at the door of the railroad companies. No company can use effectively coercive powers to keep passengers from doing such things. All persons of sound mind must be held responsible for knowledge of the usual risks of such travelling. Every one is supposed to know that a fall beside a moving train is very likely to bring some part of the body or limbs in danger of being crushed. Every one is supposed to know that in jumping from a vehicle running six miles an hour or much less he stands a good many chances of falling or being unable to fully control his movements, and that falling near a train is always dangerous. No doubt every one who tries such an experiment persuades himself that he will escape, but it is impossible to suppose that any one of common sense does not know that there is danger. It is true that there are circumstances where it is not negligence to take a choice of risks or where an act is done without freedom of choice. But the common sense of mankind teaches us that no one has a right to risk life or limb merely to avoid inconvenience. Upon the facts in this case no one can doubt that the railway agents were wrong in not stopping at the station. If put to any inconvenience by being carried farther, Bangs had a legal remedy for it. No doubt the vexation and anxiety would lead to some trouble of mind, but they cannot be held sufficient to justify running into bodily danger."

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BLACK RIVER IMPROVEMENT COMPANY v. LA CROSSE BOOMING
AND TRANSPORTATION COMPANY.

(54 Wis. 659.)

Water and water-courses — riparian owner on navigable river -- diversion by State.

A riparian owner on a navigable stream is not entitled to damages for a diversion of the water by the authority of the State for the improvement of navigation, without compensation to the State or the riparian owner.*

ACTION by a river improvement company, chartered by the State, to restrain defendant from interfering with the plaintiffs' efforts to improve Black river by closing up Black Snake river. The opinion shows the point. The defendant had judgment below

Burton & Woodward, Gregory & Gregory, and S. U. Pinney, for appellant.

M. P. Wing, G. C. Prentiss, and G. W. Cato, for respondent.

TAYLOR, J. [Admitting minor considerations.] The learned judge further held that if the charter did grant the power to close up the same, the plaintiff had no right to do so without first making compensation to the riparian owners along the banks of the Black Snake river, nor to maintain levees or embankments on the banks of the Black river without making compensation to the riparian owners. In his third conclusion of the law he says. "The owners of the Black Snake channel have, as an incident to such ownership, the right to have the waters of Black river flow past their land as it was accustomed to flow, the right of access to the navigable waters of the Black river from their own banks, and the right to land their own logs and property from the navigable waters of the river upon their own banks. The plaintiff has not and had not the right to close up the Black Snake channel, nor to prevent the natural flow of the water therein, so as to destroy the rights of riparian owners upon that channel; nor to erect or maintain levees or embankments on the banks of Black river without making compensation to the riparian owners." And because it was

* See *Borchardt v. Wausau Boom Company*, ante, p 22.

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not claimed by the plaintiff that it had made any compensation to the owners of the land along the Black Snake, or to the owners of the shore of the Black river, where it maintained its dyke or levee, he held that the defendant corporation had the right to remove such dyke or levee in order to turn the waters of the Black river into the Black Snake channel to the same extent that they ran through said channel before the plaintiff's levee and embankment were made.

[Minor matter omitted.]

The learned Circuit judge seems to place the right of the defendant company to remove the embankment upon two grounds: First, upon the fact that said company was the owner of the lands upon which it was situate at the time the embankment was removed, and because it was placed there without making compensation to it as the present owner, and because no compensation had been made to the State under whom said company claims title; and second, because that company was the owner of the banks along the Black Snake, and as such owner had the right to have the waters of Black river flow into its old channel as it was accustomed to do before the appellant company closed the mouth of the same, and because no compensation had been made to it or its grantees by the plaintiff, it had the right to remove the obstructions placed by the plaintiff in the river to prevent such flow, whether such obstructions were on the defendant's land or not.

Upon the first point we are of the opinion that any embankment which was made by the plaintiff, under its charter, on lands then owned by the State, adjoining the Black river, in order to confine its waters, were lawfully made without making any compensation to the State. The charter granted by the State, giving the corporation the power to build and maintain levees and embankments along the shores of the Black river, in order to improve the navigation of the same, by necessary implication gave the corporation the right to use for that purpose any lands owned by the State which were located upon the shores of said river. And as to lands upon which such embankments were made while the title remained in the State, the purchaser thereof from the State by a subsequent conveyance would take the same subject to the right in the plaintiff to maintain such embankments upon such lands. In construing the act of incorporation we are bound to take into consideration the situation of things at the time the grant was made, as well as

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the purposes of the grant. At the time the charter was granted to the plaintiff, the lands along the river where it would be necessary to make embankments and levees were, to a great extent, owned by the State; and as there were no means provided by the charter by which the corporation could acquire the right to make such embankments or levees upon the State lands by making compensation to the State, while the charter contained provisions for acquiring the right from private owners, although such provisions may have been insufficient to accomplish that purpose, it would seem to be a fair inference that the legislature intended to grant the right of such use to the corporation without compensation as to all lands owned by it, which it would become necessary to use in executing the purposes of the grant.

It has been held by other courts, and such appears to be the settled construction, that when the legislature authorizes a public highway, or other public improvement of a like nature by a corporation, the making of which will necessarily require the use or taking of the public lands, and no negative words are contained in the charter, and no provision made for making compensation to the State for public lands so required to be taken, the right to use or take the same for such purpose is conferred upon the corporation without making compensation therefor. This construction of the plaintiff's charter is very strongly supported by the following cases cited by the learned counsel for the appellant: *Ind. C. Railroad Co. v. State*, 3 Ind. 421; *Pa. Railroad Co. v. Railroad Co.*, 8 C. E. Green (Ch.) 157; *Davis v. E. T. & Ga. Railroad Co.*, 1 Sneed. 94; *United States v. Railroad Bridge Co.*, 6 McLean, 517. And while we are unwilling to commit ourselves to the full extent of the doctrine as laid down in the first case above cited, we are clearly of the opinion that the doctrine should be applied to this case to the extent of holding, that as to all lands owned by the State on the margin of the Black river at the time of making the improvements by the plaintiff, it had the right to use such State lands as were necessary to make levees and embankments to accomplish the purposes of the charter, without making compensation therefor; and further, that as to the State it had the right to close up any chutes or side-cuts for the purposes of such improvement, whether such chutes or side-cuts were navigable or otherwise; and that if the State had any riparian rights as owner of the lands on the banks of such chutes or side-cuts, the corporation had the right, without making

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compensation to destroy such rights, so far as the closing up of said chutes and side-cuts would destroy them; and that all subsequent purchasers from the State would take subject to such right of the plaintiff. As having some weight in the determination of this question, we may be permitted to take into consideration the general policy of the State upon questions of a similar character. No case can probably be found where any compensation was required to be paid to the State for the opening of ordinary public highways through lands owned by the State; and in relation to the construction of railroads as early as 1857, the legislature passed an act giving a right of way without compensation, through the university, school, swamp and overflowed lands of the State, one hundred feet in width, to every railroad thereafter constructed in this State. Chapter 9, Laws of 1857; chapter 79, R. S. 1858; section 1270, R. S. 1878. We are inclined to hold that the levees and embankments made by the plaintiff along the margin of Black river upon lands owned by the State at the time the same were made, were lawfully made without making any compensation to the State or to the subsequent purchasers from the State. The levee or embankment made upon lot 7 was made with the consent of the then owner, who held a contract from the State, and so far as the State retained the title with its consent; and the purchaser having afterwards forfeited his right to the land, and the State again becoming the absolute owner, its subsequent grantee must take the same subject to the right of the plaintiff to maintain said levee or embankment. Under the decisions of this court, when the purchaser, McMillan, failed to pay the interest on his certificate of purchase of lot 7, the right of the State became as perfect as though no sale had ever been made, and the title of the State was the same as though no certificate had ever been issued. *Conklin v. Hawthorn*, 29 Wis. 476, 480; *Smith v. Mariner*, 5 id. 578. In this view of the case the defendants had no right to interfere with the levees or embankments of the plaintiffs on any lands which were owned by the State at the time the same were made.

The only other ground of justification of defendants' acts is based upon the other alleged fact, that as owners of lands on the margin of the Black Snake river they had a right to have the waters of said river flow past their lands, as it was accustomed to do before the entrance of said river was obstructed by the plaintiff, unless compensation was first made to them for obstructing the

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flow in said river. As to those lands which the defendants purchased from the State on the margin of the Black Snake after the waters of said stream had been obstructed by the plaintiff, they were not entitled to any compensation for the obstruction of such flow. The State having authorized such obstruction, and having made no provision that the corporation should make the State any compensation on account thereof, none can be claimed by the State, nor by its grantees subsequent to the time when such obstructions were made.

The findings of fact do not show that the defendants, or any of them are now, or were at the time of the acts complained of by the plaintiff the owners of any lands on the shores of the Black Snake, the title to which was not in the State of Wisconsin at the time the obstructions were made which prevent the flow of the waters of the Black river into the same. And after an examination of the record we are unable to say with any certainty that they were or are now the owners of any lands on said Black Snake, which were not owned by the State at that time, except lot 8, in section 22, town 17, range 8 W. This lot 8 is a very small parcel of land at the point where, according to the government survey, the waters of the Black river were diverted into what is now called the Black Snake. This tract of land contains but a very few acres, and lies between the main river and the Black Snake, so that the owner thereof can have access to the waters of the main channel without passing up the Black Snake. But as we may be mistaken upon this question of fact, and the defendants may be the owners of lands on the banks of the Black Snake between the place where its waters leave the main channel and Rice lake, the title to which was not in the State at the time the obstructions were made by the plaintiff, it becomes necessary for us to inquire whether the ownership of such property by the defendants would justify them in removing the plaintiff's levee or embankment for the purpose of restoring the accustomed flow of water in the old channel of the Black Snake through or in front of the lands so owned by the defendants.

The learned Circuit judge held that unless the plaintiff had made compensation for any damage resulting to such riparian owners, its acts as to them were unlawful, and they were at liberty to right themselves by destroying so much of its works as might be necessary to restore the flow of the waters in the Black Snake as the

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same were accustomed to flow before the plaintiff's obstructions were put in the river. Admitting such ownership on the part of the defendants, it is contended by the learned counsel for the plaintiff, that as such owners they have no such vested right to the waters flowing in said Black Snake as will prevent the State, or the plaintiff acting in behalf of the State, from diverting such waters from that channel, if it becomes necessary or convenient to do so in order to improve the navigation of the main channel of the river. It is claimed that the riparian owner on a navigable stream has no right as against the public, or persons or corporations acting in behalf of the public, making improvements of such navigable stream, to have the waters of such stream flow in their accustomed course in front of his lands, and this contention on the part of the learned counsel for the appellant is, we think, sustained by the most learned courts of this country, and that doctrine has been quite clearly sanctioned by several decisions of this court. *Canal Appraisers v. The People*, 17 Wend. 571; *People v. Canal Appraisers*, 33 N. Y. 461, 500. These cases cited were thoroughly discussed by learned counsel, and the opinions delivered were learned and exhaustive of the subject, and in both cases it was held "that riparian owners along a navigable stream are not entitled to damages for any diversion or use of the waters by the State." In these cases the waters were not diverted in order to improve the navigation of the same stream, but to supply the Erie canal, an artificial water-course constructed by the State. *Lansing v. Smith*, 8 Cow. 146, and many other cases in that State are to the same effect.

In *Hollister v. Union Co.*, 9 Conn. 436, it was held that as to navigable rivers the State, holding the river for that purpose, may do everything for the full enjoyment of such right not inconsistent with the great constitutional provision that "private property shall not be taken for public use without just compensation;" and that consequently the placing of piers and other obstructions in the river in good faith, by a company authorized by the State to improve the navigation of such river, by means of which the water within the banks of the river was raised and the current thereof changed opposite the plaintiff's land, by reason whereof his bank was undermined and washed away, did not give any cause of action against the company.

In *McKeen v. Delaware Division Canal Co.*, 49 Penn. St., 424, it is held that "every one who buys property upon a navigable

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stream purchases subject to the superior rights of the Commonwealth to regulate and improve it for the benefit of all her citizens. If therefore he chooses to place his mills or his works, for the qualified use he may make of the water within the limits or influence of high water, he does so at his own risk, and cannot complain when the Commonwealth for the purpose of improvement chooses to maintain the waters of the stream at a given height within its channel." The same doctrine of the right of the State to control the navigable waters of the State, without liability for damages, is held in the following cases in that State: *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. v. Wright*, 9 id. 9; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; and many other decisions of the courts of that State hold the same doctrine.

In the case of *Fitchburg Railroad Co. v. Railroad Co.*, 3 Cush. 58-88, Chief Justice SHAW says: "It is incident to the power of the legislature to regulate a navigable stream so as best to promote the public convenience, and if in doing so some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*." See also *Cundel v. Delaware & Raritan Canal Co.*, 14 How. 80; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 250; *Transportation Co. v. Chicago*, 9 Otto, 635; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181; *Fay v. Aqueduct Co.*, 111 Mass. 27; *Com'rs Homochitto River v. Withers*, 29 Miss. 21; *Treat v. Lord*, 42 Me. 552. These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the State that the State may control them for public purposes in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such water-ways are as much subject to the control of the State for the purposes of the improvement of such ways, as a highway upon the land. The right of the public to raise or lower the grading of a public street without being required to compensate the adjacent owners is well established by the decisions of this court; *Dore v. City of Milwaukee*, 42 Wis. 108; *Harrison v. Bd. of Sup'rs of Milwaukee Co.*, 51 id. 645; and the right to discontinue a highway without making compensation has always been recognized by the law. The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow, is as perfect against

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everybody except the State, or some person or corporation standing in its stead, as it is in the case of unnavigable streams, and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 322 ; and the right of the State to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the State or in the riparian owner.

The doctrine of the cases above cited has, as we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this court has decided or will decide that the State may for any and all public purpose, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner without making compensation therefor need not be determined in this case. The plaintiff represents the State for the purpose of improving the navigation of the Black river, and that which it has done under its charter, which is complained of by the defendants, we think, must be, for the purposes of this action, considered to have been done for the improvement of navigation in said river. And as against the State, or the plaintiff acting in its stead, we think this court has determined that the riparian owners on the banks of the Black river, or the Black Snake river, have not the absolute right to have the waters of said river flow as they were accustomed to flow in front of or through their lands. See *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61-65 ; *Cohn v. Wausau Boom Co.*, *supra* ; *Stevens Point Boom Co. v. Riley*, 46 Wis. 237. In the cases last cited, the rights of a riparian owner upon a navigable stream, and the power of the State to restrict, limit or take away such rights, were fully discussed, and this court, after mature deliberations, came to the conclusion that these rights are the subject of legislative control without making compensation, where they are taken for the purpose of improving the navigation of such stream.

In the case of *Cohn v. Wausau Boom Co.*, *supra*, the plaintiff brought an action to enjoin the defendant company from completing its works as authorized by its charter, upon the ground that he was a riparian owner of land upon such river, which he had bought for the purpose of building thereon a saw-mill ; that in the natural flow of the water in front of his lands, he could,

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by the use of booms and other appliances, stop the logs coming down said river and hold them for the purpose of being manufactured in his mill ; that he was the owner of large tracts of pine land above said point, and that by reason of the structure already completed, and others which the defendants threatened to construct in the river and in front of his land, the channel of the river had been shifted from its natural place, the current in front thereof greatly increased, and the water made to flow with great velocity, so as to form the main channel of the river, and that by reason thereof the approach to the plaintiff's land had been rendered inaccessible for logs and lumber, all connection with the center of the stream cut off, and the fitness of the land for booming and mill purposes destroyed.

In the opinion delivered in that case by the late Chief Justice RYAN, he says : "The appellant must therefore be held to be a *quasi* public corporation, an agent of the State for the improvement of the river, and its franchises granted for a public use. Of course, private property of others could not be in any way appropriated or used by the appellant in aid of the public purpose without authority of law upon just compensation. But the land of the respondent is neither taken nor used ; the works of the appellant neither touch it nor overflow it. The statutes under which the appellant acts authorize no such interference with the property of others. They only aid the public use for which the appellant is chartered, by restraining the exercise of a private right which the legislature appears to have considered inconsistent with it ; a right which the respondent, as other riparian owners, held only by implied public license — as it were, as tenant by sufferance of the State ; a right of which the exercise might always be prohibited by public law in aid of public use. The private right is a *quasi* intrusion upon the public right, tolerated only in private aid of navigation, and gives way *ex necessitate rei* to public measures in aid of navigation." The learned chief justice then quotes the following language from his opinion delivered in the case of *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237 : " ' This private right of the riparian owner is subordinate to the public use of a navigable river, and is always exercised at peril of obstructing navigation. This subjection of the private right to the public use may sometimes impair the private right or defeat it altogether. But the public right must always prevail over the private exercise of the private right. ' "

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As against the riparian owners within the limits specified in the statute, the State has only resumed its own. Otherwise, the title, possession and use of the respondent's land remain intact. If the public action lessen its value, it is literally *damnum absque injuria*."

It will be seen, from a consideration of all the facts in that case, that this court also held, that under the authority from the State, for the purpose of aiding navigation, the corporation had the right to keep and maintain in the river opposite to the riparian owner's land, and between the thread of the stream and the land of such owner, permanent fixtures driven into or resting upon the soil under the navigable waters of the river, without making any compensation therefor. These opinions of this court seem to have adopted the doctrine of the cases above cited from the courts of other States and of the United States, as to the power of the State to control the waters of all navigable rivers or other waters of the State, whenever such control is exercised in the interest of navigation. The action of the legislature upon this question of closing sloughs would seem to indicate that such was also the view of the case taken by that department of the government; for in chapter 399, Laws of 1876, in defining the powers of improvement companies, and authorizing them to close up sloughs, among other things, in aid of navigation, it is expressly provided that no such company shall close any sloughs unless they own the entire shore on both sides thereof, or have the written consent of the owners thereof; and this same provision is re-enacted in section 1777, R. S. 1878. It would seem that the legislature must have supposed they had the power to grant the right to close such sloughs without the consent of the owners of the shores; otherwise it would have been unnecessary to declare that it should not be done except with their consent.

The view entertained by this court in the cases above cited and in this case are not in conflict with the case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, and *Arimond v. Canal Co.*, 31 Wis. 316. In those cases the question was not as to the power of the State to interfere with or control the waters of navigable streams within their channels, but whether it had the right to force such waters out of their channels and flood the lands of the citizen without compensation. The distinction between these cases and cases like *Cohn v. Wausau Boom Co.*, *supra*, and the case at bar, is commented upon by the courts in the opinions delivered therein.

The cases of *Delaplaine v. Railway Co.*, 42 Wis. 230; s. c., 24

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Am. Rep. 386, differs from the case at bar and *Cohn v. Wausau Boom Co.*, in the fact that the obstruction placed in the navigable waters in that case in front of the plaintiff's land was not placed there in aid of navigation or for the improvement of the navigation, but for an entirely different purpose, and the doctrine laid down in that case must be restricted in its application to cases resting upon the same class of facts, and cannot be extended to a case where the State places obstructions in the navigable waters of the State for the purpose of improving the navigability of the stream. If it be thought that the powers granted to the plaintiff corporation in this case were improvidently granted, and that some limit should have been placed on its right to close up navigable waters or interfere with the riparian rights of owners on the navigable waters so closed up, the legislature is the tribunal to which application should be made to remedy such evil; and so if the corporation has so made its improvements that they are inadequate to furnish the facilities to navigation on the river which the increased business on the same demands, the legislature is competent to give the proper relief in that direction. If the corporation has, by the way in which its improvements have been made and are maintained, acted unreasonably or unnecessarily, so as to obstruct navigation instead of improving it, the remedy should be by a proper action to forfeit the franchises of the corporation, or if the defendants have suffered any injury from the obstruction to navigation, they have a remedy by an action at law; but they ought not to be permitted to abate without action the works of the plaintiff as a private nuisance.

We see no reason why the defendants may not, for their own purposes, maintain sorting and rafting works in the Black river opposite to their lands, so that they do not interfere in any way with the works of the plaintiff; or why they may not excavate in front of their lands in Rice lake for the purpose of aiding in rafting logs, or for any other lawful purpose, if they do not interfere with the works of the plaintiff; and except as to these matters we are of the opinion that the court should have granted the relief demanded by the plaintiff in the complaint.

By the Court.—The judgment of the Circuit Court is reversed, and the cause remanded with directions to that court to render judgment in accordance with this opinion.

Judgment reversed

Motion for rehearing denied.

CASES
IN THE
SUPREME COURT
OF
IOWA.

WELCH V. JUGENHEIMER.

(56 Iowa, 11.)

Evidence—amount of, in civil action for indictable act.

To warrant a recovery in a civil action for an indictable act, only a preponderance of evidence is necessary.

ACTION under the Civil Damage Act. The opinion states the point. The plaintiff had judgment below.

Ed. W. Stone and Wilson & Kellogg, for appellant.

McJunkin & Henderson, for appellee.

SEEVERS, J. [Omitting other matters.] The defendant asked the court to instruct the jury that it is a violation of the criminal statutes for a person to sell or give to another, while intoxicated, any intoxicating liquors, and that the jury must be satisfied beyond a reasonable doubt that the defendant so did, before they would be warranted in finding against him. This instruction was refused, and the jury were instructed that a preponderance of the evidence

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was sufficient to enable the plaintiff to recover. This action of the court is assigned as error. *Barton v. Thompson*, 46 Iowa, 30 ; s. c., 26 Am. Rep. 131 ; was a civil action to recover damages for willfully and maliciously setting fire to certain stacks of wheat, and it was held that the plaintiff must satisfy the jury beyond a reasonable doubt that the allegations in the petition were true, before he could recover. The correctness of this decision has been questioned by counsel in several cases which have been before us, and authorities cited which were not before us when that case was determined. It is proper, also, to say that we were largely influenced in making the ruling in *Barton v. Thompson*, because of the rule which this court at an early day had adopted in the actions of slander, it being regarded as doubtful whether a distinction could be drawn between such actions and any other civil action in which a crime is charged. A more careful examination of the books satisfies us that whatever may be the rule in actions of slander or libel, where a crime is charged and justification is pleaded, the rule in *Barton v. Thompson* is in conflict with the weight of authority and cannot be sustained on principle, and is therefore overruled. That the authorities are conflicting must be conceded. The doctrine that where a criminal act is charged in a civil action it must be established beyond a reasonable doubt before there can be a recovery, is approved in 2 Greenl. Ev., § 408 ; Taylor's Ev. 97, and Bishop on Mar. and Div., § 644. It is disapproved in 2 Whart. Ev., § 1246, Cooley on Torts, 208, and Proffatt on Jury Trials, § 335.

The only case cited by Greenleaf in support of the rule is *Thurtell v. Beaumont*, 8 Eng. Com. Law, 531 ; 1 Bing. 339. This case was decided in 1823, and we are not aware that it has been followed by the courts of England. In relation thereto it has been said : "The decision on this point in *Thurtell v. Beaumont* was made on application for a rule, and without much consideration. It has never received approbation in the English courts, although as a rule of evidence occasions have repeatedly arisen for its adoption and application." DEPEW, J., in *Kane v. Hibernia Ins. Co.*, 39 N. J. 697 ; s. c., 23 Am. Rep. 239.

Leaving out of view for the present actions of slander and libel, the following cases should be regarded as adhering to the rule adopted in *Thurtell v. Beaumont*, *supra* ; *Thayer v. Boyle*, 30 Me. 475 ; *Butman v. Hobbs*, 35 id. 228 ; *McConnell v. Mutual Ins. Co.*, 18 Ill. 28 ; *Pryce v. Security Ins. Co.*, 29 Wis. 270, and *Freeman*

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v. *Freeman*, 31 id. 235. The following cases have been cited as also adhering to the rule ; *White v. Comstock*, 6 Vt. 405 ; *Brooks v. Morse*, 10 id. 37, and *Riker v. Hooper*, 35 id. 457, but as these actions were brought to recover statutory penalties there is some doubt whether a rule applicable to them should prevail in civil actions brought to recover damages.

In the following cases the rule aforesaid is disapproved : *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169 ; *Blaeser v. Milwaukee Mechanics' Ins. Co.*, 37 id. 31 ; s. c., 19 Am. Rep. 747 ; *Knowles v. Scribner*, 57 Me. 495 ; *Hoffman v. Western Ins. Co.*, 1 La. Ann. 216 ; *Schmidt v. Ins. Co.*, 1 Gray, 529 ; *Bissel v. West*, 35 Ind. 54 ; *Young v. Edwards*, 72 Penn. St. 267 ; *Aetna Ins. Co. v. Johnson*, 11 Bush, 587 ; s. c., 21 Am. Rep. 223 ; *Rothschild v. Ins. Co.*, 62 Mo. 356 ; *Munsen v. Atwood*, 30 Conn. 102 ; *Elliot v. Van Buren*, 33 Mich. 49 ; s. c., 20 Am. Rep. 668 ; *Bradish v. Bliss*, 35 Vt. 326 ; *Kane v. Hibernia Ins. Co.*, before cited.

In some of these cases instructions were approved which required more evidence to enable the plaintiff to recover when the cause of action was based upon a crime than in other civil actions, because of the presumption of innocence which prevails in all cases. That is, the evidence must so far preponderate as to overcome such presumption. But the rule that a preponderance is sufficient still remains intact, for the ruling only amounts to this : that the preponderance of the evidence must be sufficient to overcome not only the other evidence but the presumption of innocence, such presumption being regarded as an established fact to be overcome, as are other facts ; and this we think must be so.

The rule that guilt must be established in a criminal action beyond a reasonable doubt was engrafted on the common law because of a tenderness for, and in favor of, persons charged with crimes which affected their lives and liberties, at a time when the criminal law was harshly administered, and cruel and harsh punishments were inflicted for slight and trivial offenses. It has been retained when in a great measure the reason for its adoption has ceased. A conviction for a crime is followed by penal consequences affecting the life and liberty of the person charged. Not so in a civil action. And the general rule in this class of actions is that the rights of the parties must be determined by a preponderance of the evidence. In criminal actions the good character of the person charged may be shown as a defense, and it may entitle him to an

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acquittal. *State v. Northrup*, 48 Iowa, 583 ; s. c., 30 Am. Rep. 408. While in civil actions no such rule obtains, nor can, unless in exceptional cases, the good character of the person charged with a crime be shown. *Bays v. Herring*, 51 Iowa, 286 ; 1 Greenl. Ev., § 54.

As the rule in criminal actions is that the evidence must establish the guilt of the person charged with crime beyond a reasonable doubt, and the rule in civil actions is that a preponderance of the evidence is sufficient to enable the injured party to recover whatever damages he has sustained because of the alleged criminal act, it cannot be said a recovery in the latter has the force and effect of a conviction in a criminal action, in so far as it tends to degrade the person against whom the recovery is had, because he has not been found guilty of any crime as required by the laws of the land. Therefore it is that it has been well said there may be a recovery in a civil action, although the alleged crime on which the action is based has not been established.

As the consequences which follow a recovery in a civil action are so materially different from those which follow a conviction in a criminal action, and as the reason for the establishment of the doctrine of reasonable doubt has no application to civil actions, we do not think the rule should be extended to the latter, unless slander and libel, when a crime is charged and justification pleaded, constitute an exception. In one or more of the above cited cases it is said this is so. Whether such conclusion is well grounded we are not agreed, and as it is unnecessary to determine it at this time, we do not do so. We deem it proper however to call attention to the fact that it was held in *Bradley v. Kennedy*, 2 G. Greene, 231 ; *Furshes v. Abrams*, 2 Iowa, 571 ; *Fountain v. West*, 23 id. 9, and *Ellis v. Lindley*, 38 id. 461, that in such actions a plea of justification charging a crime must be established beyond a reasonable doubt. The opinion in *Fountain v. West* was written by DILLON, J., but in *Scott v. Home Ins. Co.*, 1 Dill. 105, in which case it was pleaded as a defense that the plaintiff had set fire to and caused the building insured to be burned, the jury were instructed that the doctrine of reasonable doubt did not apply. The rule held in the cases above cited in this State is the direct opposite to that held in *Elliott v. Burrell*, 60 Me. 209 ; *Folsom v. Brown*, 5 Fost. 114 ; *Matthews v. Huntly*, 9 N. H. 146, and *Kincaid v. Bradshaw*, 3 Hawks (N. C.), 63, and this latter rule is said to be correct in

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Cooley on Torts, 208. In our opinion the Circuit Court did not err in refusing the instruction asked, and in instructing as was done.

For the errors before considered the judgment is reversed.

Judgment reversed.

GUNDERSON V. RICHARDSON.

(56 Iowa, 56.)

Sunday—action for fraudulent representations to induce contract on.

No action lies for fraudulent representations inducing to a contract made on Sunday, although the representations were criminal.

ACTION of damages for fraud, inducing to a contract made on Sunday. The plaintiff had judgment on demurrer.

George E. Clarke, for appellant.

J. H. Hawkins, for appellee.

ROTHROCK, J. It is well settled that when parties enter into a contract on Sunday, and either of them undertakes to enforce it by action, or to recover damages growing out of the illegal transaction, the law will leave the parties where it finds them, and no recovery will be allowed. The law leaves the parties to suffer the consequences of their illegal acts. *Pike v. King*, 16 Iowa, 49; *Kinney v. McDermot*, 55 id. 674; s. c., 39 Am. Rep. 191; *Smith v. Bean*, 15 N. H. 577. In the last cited case it is said that “no action will lie for fraud or breach of warranty upon a Sunday contract.”

Counsel for appellee contends however that this action is not for fraud or breach of warranty, but that it is an action for damages against the defendant for knowingly offering to trade a horse affected with the glanders, and that such act being unlawful and a crime under section 4056 of the Code the defendant cannot escape liability by asserting that his unlawful and criminal act was committed on Sunday.

We have set out the petition, and the count of the answer demurred to, because of this line of argument by defendant’s counsel.

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It appears to us, that by all the allegations of the petition, the plaintiff bases his right to recover by reason of the contract for the exchange of the horses. To support these allegations it is absolutely essential to show that the exchange was actually made. He could establish his damages in no other way. It was therefore incumbent on him to show the contract as he alleged it to be. This he could not do, for the law leaves the parties to such contracts where they place themselves. In other words, as appears from the petition, both these parties were active participants in violating the law by entering into a contract on Sunday. The plaintiff claims that in making the contract defendant defrauded him to his damage. The law will not afford him redress, and it will not avail the plaintiff to assert that the defendant, in making the Sunday contract, also violated another provision of the Criminal Code.

The case, it appears to us, is essentially different from the case of one travelling on Sunday and being assaulted by another or injured by a defect in the highway. In the latter class of cases the plaintiff does not seek to enforce an illegal contract, or to recover damages growing out of such contract to which he was an active party; nor, as is said in *Schmid v. Humphrey*, 48 Iowa, 652; s. c., 30 Am. Rep. 414, "is he seeking to enforce any right obtained by the breach of any law."

We think the demurrer to the answer should have been overruled.

Judgment reversed

MILLER V. POAGE.

(56 Iowa, 96.)

Negotiable instrument — uncertainty of time of payment.

A note is rendered non-negotiable by a provision that "if the agent does not sell enough in one year, one more is granted." (See note, p. 88.)

ACTION on the following instrument in writing:

"\$100. AUDUBON TP., AUDUBON Co., IOWA, April 26, 1878.

"One year after date I promise to pay to the treasurer of the National Iron Fence Co., of Cedar Rapids, Iowa, or order, one hundred dollars, at Cedar Rapids, Iowa, value received, with in-

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terest at ten per cent from date. Reasonable attorney fee if suit be instituted on this note. *If this agent does not sell enough in one year, one more is granted.*"

The defendant had judgment below

Ward & Harmon, for appellant.

I. W. Whittam, for appellee.

SEEVERS, J. The only question to be determined is whether the instrument sued on is negotiable. The appellee insists it is not, because of the italicized words. The appellant insists the instrument is not payable out of a certain fund, and is payable at the expiration of two years from its date, if not sooner, and is therefore negotiable.

We think the true construction is that the maker was the agent of the payee for the sale of something, and if he realized sufficient funds from such sales the amount specified was to be paid within one year. Payment during such time was to be made only on condition that the necessary funds were realized. This clearly implies the instrument was to be paid out of a particular fund, and for this reason, and because payable only on the happening of a condition, it was not negotiable during the period aforesaid. It is true it is payable absolutely at the expiration of two years. But we think it must have been negotiable when executed, and continuously from that time, or not at all.

No adjudicated case to which our attention has been called is precisely like this. The nearest approach to it is *Cotta v. Buck*, 7 Metc. 588. It is difficult to draw a sharp distinction between the two cases. We shall not therefore make the attempt, but determine the case at bar upon principle, as we deem right.

Affirmed.

ADAMS, C. J., and DAY, J., dissented.

NOTE BY THE REPORTER.—In a dissenting opinion in this case, DAY, J., observed: "The italicized portion does not render the note payable out of a particular fund, but simply provides a condition upon which the payment shall be extended one year. The note may be payable in one year. It is payable absolutely in two years."

In *Smith v. Van Blarcom*, 45 Mich. 371, the note provided that "the makers and indorsers of this note expressly agree that the payee or his assigns may extend the time of payment thereof indefinitely, as he or they may see fit." Held, non-negotiable. CAMPBELL, J., said: "Plaintiffs in error claim that this clause was void, and that the note should stand without it. But it cannot be held void, unless it is either illegal or nugatory, or

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meaning nothing. Parties may make such innocent bargains as they choose, and the effect will not be to destroy the legality of the instrument, although it may destroy its negotiability. By the terms of this note, which must be read subject to the condition, it was not payable absolutely three months after date, or at any other one time. The time of payment could be postponed not merely once but as often as either Charles H. Van Blarcom or his assigns might think it desirable. There is nothing on the face of the note whereby any one can tell, either directly or by reference to any particular event, at what period this paper will become absolutely payable. We cannot conceive how this can be treated as not payable on a contingency. It would not be easy to harmonize all the cases on this subject, and we shall not attempt to do so. If any of them maintain that the time of payment may be indefinitely shifted at the will of any of the parties, we cannot accept the doctrine. Public policy would not be furthered, and honesty would not be subserved by encouraging the negotiation of paper which is so palpably uncertain on its face that no good business man can look at it without seeing that it must have originated in peculiar dealings which would probably, if known, qualify its obligation. * * * We think the condition in question reduced the paper to a simple contract and destroyed its quality as a negotiable note."

So in *Woodbury v. Roberts*, Iowa Supreme Court, Sept. 1882, where the note provided that "the makers and indorsers of this obligation, expressly agree that the payee or his assigns may extend the time of payment thereof from time to time, indefinitely, as he or they may see fit." *Held*, non-negotiable. BECK, J., observed: "When an instrument is not certain, or is not capable of being made certain as to the time of payment, the law does not regard it as negotiable paper. By the terms of the condition of the note in suit it would never fall due, but could be indefinitely extended at the will of the maker and indorsee, who, it will be observed, is the same party. When the instrument was executed the time of its maturity was contingent upon the option of the maker of the note. It was impossible to determine when it would become due by the assent of the maker. The time of payment was uncertain, and was not capable of being made certain. Nothing happened after its execution to remove this uncertainty. Notes which by their terms are payable on or before a fixed time or a specified event, are, it is true, uncertain as to the time at which they are payable. But there is no uncertainty as to the time when they become absolutely due. Paper of this character is regarded by the courts as negotiable. But the note before us may never fall due, for payment may be extended indefinitely. The rules applicable to commercial paper were transplanted into the common law from the law merchant. They had their origin in the customs and course of business of merchants and banker, and are now recognized by the courts, because they are demanded by the wants and convenience of the mercantile world. Surely these rules ought not to be extended to paper, the like of which was never heard of in mercantile transactions. What business man would expect a banker to discount his paper in the form of the note in question in this case? What merchant ever offered to give or was asked to receive a promissory note containing a like condition? We may safely say that notes of this kind are unknown to commercial transactions. Why, then, extend to them the rules of the commercial law? By regarding such paper as non-negotiable no prejudice will result to the mercantile and financial business of the country, but sharpers will be defeated in their attempts to swindle the confiding and unwary — a result in accord with sound public policy and good morals. *Miller v. Poage*, 53 Iowa, 98; *Smith v. Van Blarcom*, 45 Mich. 371, support the conclusions we have reached, that the note in suit is not negotiable. The case last named holds a note to be non-negotiable which contains the precise condition found in the note before us."

In *Cota v. Buck*, 7 Met. 588, the note was payable "as soon as can be realized of the above amount for the said property, I have this day purchased of the said P., which is to be paid in the course of the season now coming." *Held*, negotiable.

In *Tradesmen's Nat. Bk. v. Green*, 57 Md. 603, a note payable by the commissioners of Madison square, "out of the appropriation for the said square for the year 1879, for lamps and fixtures furnished at Madison square," was held non-negotiable, "because the time of its payment is uncertain, is subject to a contingency not inevitable, and it is made payable out of a particular fund."

Daniels says (1 Neg. Inst., § 43): "If the time must certainly come, although the parties

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ular day is not mentioned in the note, it is regarded as negotiable, as the fact of payment is then certain." Daniels gives an exhaustive review of the cases. See, also, *First Nat. Bk. v. Bynum*, 84 N. C. 24; s. c., 37 Am. Rep. 604; *White v. Smith*, 77 Ill. 351; s. c., 30 Am. Rep. 251.

As to notes payable on a certain day or before, at the option of the maker, they have been held negotiable. *Jordan v. Tule*, 19 Ohio St. 586; *Ernst v. Steckman*, 74 Penn. St. 13; s. c., 15 Am. Rep. 542; *Mattiann v. Marks*, 31 Mich. 421; s. c., 18 Am. Rep. 197; *Walker v. Woollen*, 54 Ind. 164; s. c., 23 Am. Rep. 636; *Curtis v. Horn*, 58 N. H. 504. So of a note payable "one day after date or at my death"; *Conn v. Thornton*, 46 Ala. 567. The Massachusetts cases are to the contrary. *Hubbard v. Mosely*, 11 Gray, 170; *Way v. Smith*, 111 Mass. 583; *Stull v. Silva*, 119 Id. 137; *Mahony v. Fitzpatrick*, A. D. 1882. These cases are followed in *Chouteau v. Allen*, 70 Mo. 220, 229.

KAISER V. LAWRENCE SAVINGS BANK.

(56 Iowa, 104.)

Corporation — individual liability of stockholder — good faith.

If a corporation is illegally formed, the stockholders are not relieved from individual liability by the good faith of the corporators or the actual transaction of business by the corporation.

ACTION for recovery from defendant Hoag, of money deposited with defendant bank, on the ground of partnership. Defense, that the bank was a corporation. The opinion states the point. The plaintiff had judgment below.

Hanna, Fitzgerald, and Hughes, for appellant.

Hoffman, Pickler & Brown, and *L. M. Fisher*, for appellee.

ADAMS, C. J. [After holding that the bank was illegally formed.] The defendant insists however that in order to establish the corporate existence of the Lawrence Savings Bank as against plaintiff it is sufficient to show authority to create the corporation. a *bona fide* attempt on the part of the corporators to become incorporated, and the doing of business as a corporation. In support of this proposition the defendant cites *Buffalo & Allegany Railroad Co. v. Cary*, 26 N. Y. 77. In that case the court said, "that if the papers filed are colorable, but so defective, that in a proceeding on the part of the State against it, it would for that reason be dissolved. yet by the acts of user under such organization it becomes

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a corporation *de facto*, and no advantage can be taken of such defect in its constitution collaterally by any person." Substantially the same doctrine was enunciated in *Kurtz v. Paola Town Co.*, 20 Kans. 403, and *Pape v. Capital Bank*, id. 440 ; s. c., 27 Am. Rep. 183. It should be observed however that in those cases the defendant set up a want of incorporation of the plaintiff and sought to escape liability upon that ground. In the case at bar the defendant sets up exemption, averring that the attempt to become incorporated and the doing of business under a claim of incorporation were sufficient to create the exemption.

It will be seen at once that the principle involved in those cases is essentially different from that in the case at bar.

It is hardly necessary to say that where incorporation has once taken place no act of forfeiture can be set up in a collateral action, until forfeiture has been judicially declared in an action brought for that purpose. See Angell & Ames on Corporations, § 636, and cases cited. But the principle involved in those cases is essentially different from that in the case at bar.

In *Humphrey v. Mooney*, 1 Col. 193, a creditor of an assumed corporation sought to hold a member as a partner. It was held that as his right of action was based upon an express contract with the assumed corporation he was estopped to deny that it was in fact a corporation. The doctrine of that case is substantially that relied upon by the defendant. But it seems to us that it is not sustained by the weight of authority. The court cited in support of the decision *Eaton v. Aspinwall*, 19 N. Y., 121, and *Buffalo, etc., R. Co. v. Cary*, 26 N. Y. 77, but neither of the cases, it appears to us, is in point.

There may indeed be certain irregularities, or omissions to comply with provisions merely directory, which would be sufficient to sustain an action brought to declare a forfeiture, but insufficient to sustain a collateral action brought to enforce an individual liability of a member. But where the attempt at incorporation is under a general law, and there is a non-compliance with the law in a material respect, there is, we think, such want of incorporation that exemption from individual liability is not secured. In *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 424, the court said : " There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as required of the individuals seeking to become incorporated, but

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which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question."

Burt v. Salisbury, 55 Mo. 310, was an action brought upon a promissory note, purporting to be executed by the directors of the North Missouri Central District Stock, Agricultural and Mechanical Association. The action was brought against the directors upon the ground that the association was not incorporated at the time the note was given, and that the directors were therefore individually liable. It appeared that the association at the time the note was given was fully incorporated in every respect except that it had failed to file its articles of incorporation with the secretary of State, as the statute required. It was held that the directors were individually liable.

In *Bigelow v. Gregory*, 73 Ill. 197, the defendants were held liable as partners for goods sold to an assumed corporation of which they were members. The defect in the incorporation consisted in a failure to file the articles of incorporation with the clerk of the city where the corporation was to transact its business. In that case the court said: "There is a manifest difference where a corporation is created by a special charter, and there have been acts of user, and where individuals seek to form themselves into a corporation under a general law. In the latter case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. And there would seem to be a distinction between a case where, in a suit between a corporation and a stock-holder or other individuals, the plea of *null tiel corporation* is set up to defeat a liability which he may have contracted with the other, and the case of a suit against individuals who claimed exemption from individual liability on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former." This is a late decision, and seems to have been made with a full recognition of the authorities claimed to hold an adverse doctrine.

See also *Abbott v. Omaha Smelting Co.*, 4 Neb. 416, and *Harria v. McGregor*, 29 Cal. 125.

In our opinion, the proprietors of the Lawrence Savings Bank

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failed to become incorporated, and there was nothing in what they did or claimed which can properly be held as sufficient to secure them exemption from individual liability.

The judgment therefore of the District Court must be affirmed.
Affirmed.

DRAPER V. RICE.

(56 Iowa, 114.)

Agency — authority to receive payment of note.

One authorized to sell property and take a note in payment in the name of the principal, having delivered the note to the principal, is not impliedly authorized to receive payment thereof.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

J. T. Rice and Geo. W. Wilson, for appellant.

Mills & Keeler, for appellee.

ADAMS, C. J. The note was made payable to the plaintiff, or bearer. It was given in part payment for a melodeon which was sold to the defendant as the property of the plaintiff. The trade was negotiated by one Jacobs, who took the note and delivered it to the plaintiff. Afterward the defendant paid the amount of the note to Jacobs, but he did not get the note up, because it was in the possession of the plaintiff. The payment was made on the strength of Jacob's statement that he was the agent of the plaintiff and was authorized to collect the note, and would obtain it of the plaintiff and deliver it to the defendant.

Jacobs was not in fact the plaintiff's agent at the time of the payment, and plaintiff never received the money paid. The defendant however contends that while this may be so, he was justified in assuming that Jacobs was the plaintiff's agent, because the plaintiff in receiving the note had recognized him as such.

The precise question certified for our decision is in these words :
“ When the plaintiff as payee seeks to recover on the note, can the

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defendant Rice maintain his defense of payment made to the assumed agent Jacobs, in pursuance of the agreement made by said agent to obtain the note, although the said agent was acting without authority, as shown in this case."

As showing that such defense can be maintained, the defendant relies upon *Eadie v. Ashbaugh*, 44 Iowa, 519. But that case is not in point. It would at most only have the effect to show that the plaintiff, in accepting the note, made Jacobs his agent in the transaction out of which the note grew. But that agency would not, we think, extend to the matter of payment. Authority to sell a piece of property as agent, and take a note for it in the name of the principal, would not of itself include the authority to receive payment. Had the note sued on been intrusted to Jacobs by plaintiff, although for some purpose other than collection, the case might be different.

It must be seen at once that the rule contended for would be a pernicious one. No person could with safety, employ an agent to take a promissory note, if payment made to the agent at any time afterward were to be held payment to the principal, the agency having in fact been terminated, and the note remaining in the hands of the principal.

In our opinion the court did not err in rendering judgment for the plaintiff.

Affirmed.

SUPPLEMENTAL OPINION.

In a petition for re-hearing in this case, the appellant insists that the case cannot be distinguished from *Eadie v. Ashbaugh*. It is said that when the opinion concedes that the acceptance of the note by the plaintiff had the effect to show that the plaintiff made Jacobs his agent in the transaction out of which the note grew, the opinion concedes, virtually, the appellant's whole position, for it is said that the evidence shows that in the transaction, out of which the note grew, it was agreed between the defendant and Jacobs that the note should be paid in the use of livery to be furnished to Jacobs, and that it was so paid.

The note by its terms however was made payable to the plaintiff in money. It is not allowable to show that by a parol contemporaneous agreement the note was not to be paid to the plaintiff in money, but to a different person, and in a different way.

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In *Eadie v. Ashbaugh* the defendant set up a warranty for the machine for which the note was given. The only question was as to whether the warranty should be considered as made by the plaintiff's agent. If so, it was of course allowable to show it, whether made by parol or writing. The petition for a re-hearing must be overruled.

KENDRICK V. EGGLESTON.

(56 Iowa, 123.)

Vendor's lien — waiver.

One who takes in payment for real estate the secured and indorsed note of a third person, supposed to be good, thereby waives his lien, although it proves worthless.*

ACTION on a promissory note and to establish a vendor's lien. The opinion states the facts. The plaintiff had judgment below.

Traverse, Payne & Eichelberger, for appellants.

M. H. Jones & Son, and *Trimble, Carruthers & Trimble*, for appellees.

DAY, J. I. The defendant, Caroline Eggleston, formerly Caroline Schilling, bought the land now in controversy from Jeremiah Eggleston, for the sum of \$4,400. She paid for the land in money and by the transfer of certain notes, amongst which was a note on John Zulauff for \$3,000, on which \$1,000 had been paid, which note she indorsed in blank. Jeremiah Eggleston deeded the land to Caroline Eggleston and her two minor children, Clara and Louisa Schilling. At the time this deed was made Caroline Eggleston owned over six thousand dollars' worth of property in her own right, which she obtained from her former husband, and was not in debt. Afterward Jeremiah Eggleston traded the Zulauff note to the plaintiff, William Kendrick, for land and stock, and Kendrick's own note for \$359. The Zulauff note was secured by a mortgage

*Compare *Fouch v. Wilson* (60 Ind. 64), 26 Am. Rep. 651.

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on land and mill property. At the time of these transactions all the parties to the sale and transfer of the Zulauff note considered it good, and the maker solvent. The Zulauff mill property was in fact incumbered by a judgment which was prior to the lien of the Eggleston mortgage. Zulauff proved to be insolvent, so that only about \$150 was realized from him on said note. Under these facts the plaintiffs claim that they are entitled to a vendor's lien upon the property which was purchased in part by a transfer of the Zulauff note. If the plaintiffs are entitled to a vendor's lien, it is upon the ground that Jeremiah Eggleston acquired such a lien, which passed to the plaintiffs by the transfer of the Zulauff note. It is a general doctrine of equity that the vendor of real estate retains a lien upon the property sold for the unpaid purchase-money, unless it appear from the circumstances of the case that the lien was waived. It is also a general principle that the taking of distinct security, whether of real or personal property, is evidence that the seller did not repose upon the lien, and discharges the lien. It is also said that the sounder doctrine, and the higher authority, is that taking the responsibility of a third person for the purchase-money is taking security, and discharges the lien. 4 Kent Com., § 153.

In leading cases in equity it is said: "It may be considered as settled by the unanimous concurrence of the cases in this country, that wherever this lien is recognized at all it will not be affected by the vendor's taking the bond or bill single of the vendee, or his negotiable promissory note, or a check drawn on the bank by the vendee, which is not presented or paid, or any instrument whatever, involving merely the personal liability of the vendee; but that taking a mortgage of other property or the bond or note of the vendee with a security, or a negotiable note drawn by the vendee and indorsed by a third person, or drawn by a third person and indorsed by the vendee, will repel the lien presumptively."

That the taking of security is *prima facie* a waiver of the lien, see 2 Wash. Real Prop. 9; *Vail v. Foster*, 4 Comst. 312; *Fish v. Hamland*, 1 Pai. 20; *Trid v. Smith*, 2 Mich. 243; 4 Wait Act. and Def. 323; *Boylon v. Champlain*, 42 Ill. 57; *Landers v. McAfee*, 41 Ga. 684; *Durette v. Briggs*, 47 Mo. 356; *Tarran v. Shrener*, 26 Ind. 364; *Schurz v. Stein*, 27 id. 112; *Brown v. Gilman*, 4 Wheat. 253; *Burke v. Gray*, 6 How. (Miss.) 527; *Campbell v. Baldwin*, 2 Humph. 248.

It is true, as held in *Garson v. Green*, 1 Johns. Ch. 309, that *prima facie* the purchase-money is a lien upon the land, and it rests upon the purchaser to show that the vendor agreed to rest on other security. But when it is shown that other security was taken, the presumption that a lien was intended is rebutted, and the burden of proof is then cast upon the vendor to show that a waiver of the lien was not intended. The plaintiff relies upon *Cordova v. Hood*, 17 Wall. 1. In this case the purchaser executed for the purchase-money his own note secured by his son. There was evidence showing clearly that neither party understood the note to be taken as a substitute for the lien. It was said by the court that the taking of a note or bond from the vendee with a surety has generally been held evidence of an intention to rely exclusively upon the personal security taken, and therefore presumptively to be an abandonment of the lien, but that this raises only a presumption, open to rebuttal by evidence that such was not the intention of the parties. The case of *Wilson v. Lyon*, 51 Ill. 166, also cited and relied upon by the appellee, is one where a vendor's lien clearly existed at the time of the sale, which it was held was not displaced by the subsequent assignment of a policy of life insurance, the proof showing that the assignment was not taken as independent security. Most of the other cases cited by appellee hold simply that the acceptance of a note of a third person for goods does not constitute payment unless so agreed, and that payment in forged or worthless paper does not satisfy a debt. It is evident that these cases are not applicable to the question of a waiver of a vendor's lien by taking collateral security.

The plaintiff insists that the presumption of waiver arising from the taking of collateral security is rebutted by the fact that the security was worthless. In support of this position appellee cites *McDole v. Purdy*, 23 Iowa, 277. That was a case of the exchange of lands, in which the defendant made false and fraudulent representations as to the quality, situation, character and value of the land conveyed to plaintiff, on account of which it was found that the purchase-price of the land conveyed by plaintiff was in part unpaid, and that to that extent the plaintiff was entitled to a vendor's lien. There was no fraudulent representation in this case. All parties supposed the security was good at the time of the purchase from Jeremiah Eggleston. The lien is claimed simply from the fact that the security afterward proved to be worthless. If

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this is a ground for enforcing a vendor's lien, it follows that the lien may always be enforced, notwithstanding the taking of collateral security, whenever such enforcement becomes necessary for the protection of the vendor. No such doctrine as this is recognized by the cases upon the subject. The court, in our opinion, erred in the establishing of a vendor's lien.

The judgment of the court below is reversed.

Judgment reversed.

HART V. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.

(55 Iowa, 106.)

Negligence — omission of railroad company to maintain flagman.

The omission of a railroad company to maintain a flagman at a highway crossing may be considered on the question of its negligence, in an action for an injury to a traveller, driving on the highway, caused by the sudden escape of steam from a locomotive.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

Smith & Baylies, for appellants.

Wright, Gatch & Wright, for appellee.

DAY, J. The evidence tends to establish the following facts: The plaintiffs, John P. Hart and Louisa A., his wife, left their home in Warren county, on the morning of January 29, 1878, arrived in Des Moines before noon of the same day, and stopped with friends at the north-west corner of Fourth and Elm streets. They were travelling in a two-seated, open buggy, drawn by a pair of gentle horses. The place where they stopped is two blocks south of Vine street, on which are the principal tracks of the C., R. I. & P. Railroad. Between three and four o'clock in the afternoon of the same day they resumed their journey, to visit relatives some miles north of Des Moines. They drove up Fourth street, crossed the Valley railroad on Market street, and when nearing Vine street

* See *Welch v. Hannibal & St. Joseph R. Co.* (72 Mo. 451), 37 Am. Rep. 440, and note, 442. So held in *Shaber v. St. Paul, etc., R'y Co.*, 28 Minn. 103, as to an omission to maintain a sign at a street crossing, although none was required by statute.

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found the Fourth street crossing blocked by a train of cars standing across it. They then turned west through the alley in the middle of the block to Fifth street, striking Fifth street about one hundred and forty feet south of Vine street. When they came upon Fifth street they saw defendant's engine standing upon one of the five tracks on Vine street, facing west and with its front about at the sidewalk on the east side of Fifth street, where it had been standing for about twenty minutes. Plaintiffs had been informed that the train on the Winterset and Indianola branch of said road was in the habit of lying there for some time preceding its departure, and that when about ready to go out it was backed down east to the depot between Third and Fourth streets. The engine was apparently attached to a train lying in its rear. There was no flagman at the station, nor were any other means provided to give warning of danger. The plaintiffs looked and listened for a sign or signal of motion or danger, and neither seeing nor hearing any, they proceeded to drive across the street. Just as their team had arrived at the street crossing, and as it was about to step upon the first railroad track on Vine street, the steam was let off the engine, the bell was rung and the engine began to back. The noise frightened the horses and they immediately backed, cramped, turned and upset the buggy, by which plaintiffs were thrown upon the ground and both seriously injured.

When an engine has been standing for some time, water forms in the cylinder from the condensation of steam, and it is usual, and considered necessary for the safety of the engine, for the engineer to open the cocks under the cylinder and expel the water before starting the engine.

The court instructed the jury as follows: "10. It is alleged in plaintiffs' petition that defendant failed and neglected to provide a flagman at this crossing. There is no statute in this State requiring railroad companies to have flagmen at street crossings, and at common law it is only required that defendant shall have flagmen at crossings very much used, to warn persons about to cross the track of the approach of engines and cars thereto, and to prevent collision, by persons on the highway, with such moving engines and cars, and failure to have a flagman at the crossing is immaterial in this case, and not to be considered by you, unless you believe from the evidence that such engine was approaching, or about to approach toward said crossing."

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“ 13. If in the testimony, you find no evidence as to what would be the duty of a flagman, then you cannot presume what such duties would be, and in the absence of testimony as to his duties, the want of a flagman would be taken out of your consideration, and would not be proper for you to take into account in making your conclusion as to defendant's negligence.”

1. These instructions are inconsistent, and for that reason erroneous. The tenth instruction directs the jury as a matter of law that the duty of a flagman is to warn persons about to cross the track of the approach of engines, and to prevent collisions by persons in the highway with such moving engines and cars. The thirteenth instruction in effect directs the jury that the duty of a flagman is a matter of fact to be determined from the testimony, and that in the absence of testimony on the subject they cannot determine what the duty of a flagman is. The conflict between the instructions is apparent.

2. These instructions are not only conflicting, but they are both positively erroneous, to the prejudice of the appellants. The case of *Norton v. Eastern Railroad Company*, 113 Mass. 366, is directly in point. In that case the plaintiff offered to prove that he was riding in a wagon drawn by a horse on a highway crossed by the defendant's track at grade ; that when he had approached within thirty-six feet of the track a train of cars passed over the crossing and frightened the horse, causing him to kick and break the plaintiff's leg ; that there was no flagman near the crossing, and no flag was shown, bell rung or whistle sounded to indicate the approach of the train, though there was a flag station there, and a flagman was accustomed to display a flag there to warn travellers of the approach of the train. The court rejected this and other evidence offered by the plaintiff, and ruled that the facts, if proved, would not support the action. The statute required the ringing of a bell and the sounding of a whistle, but did not require the employment of a flagman. The defendants insisted that even if they neglected the statutory signals of ringing the bell and sounding the whistle they would not be liable, because such signals are intended to protect travellers at highway crossings from actual collision only, or at most from taking a position involving imminent danger of collision.

The court, after holding that the signals provided by statute cannot be limited as claimed, proceeded to consider the evidence offered of the absence of a flagman as follows : “ Evidence was

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offered by the plaintiff tending to show that the defendants had failed to take precautions, other than those expressly required by statute, in announcing their approach to the crossing (such as were proper and such as they had accustomed travellers on its highway to expect), which was excluded by the court, the plaintiff not having been exposed by neglect of them to collision or any danger thereof. That mere compliance with statutory requirements will not absolve the railroad corporations from any duties they were under before, or excuse them from taking other reasonable precautionary measures when their trains are crossing or about to cross a highway, is well settled. In case of collision, it is for the jury to say whether such measures have been adopted, and whether under the circumstances of the case the railroad corporation has used reasonable care to prevent it. *Bradley v. Boston & Maine Railroad*, 2 Cush. 539 ; *Linfild v. Old Colony Railroad Company*, 10 id. 562. The reasons upon which we have held that the statutory requirements are not intended for the purpose of guarding against collision only, at crossings of the highway made at grade, compel us also to hold that the obligation to take such other reasonable precautions, at such points, as are required for the safety of the traveller upon the highway, is one which is due to him, not only for this purpose, but also for that of protecting him, or of enabling him in the exercise of reasonable care to protect himself, in approaching the crossing, from the danger of alarm to the animals he is driving. The evidence upon this subject, which was excluded by the learned judge who presided, should therefore have been admitted."

The evidence here referred to, and which was rejected, was evidence that there was no flagman at the crossing to give warning of an approaching train. No proof was offered of the duties of a flagman. The court held as a matter of law, that it is the duty of flagmen, not only to warn against collisions, but also to give such warning as will enable a traveller approaching a crossing, in the exercise of reasonable care, to protect himself from the danger of alarm to the animals he is driving. This case, we think, announces the correct rule. It follows that both of the instructions we are considering are erroneous.

II. The court further instructed the jury as follows :

"If you believe from the evidence that the noises made upon defendant's engine, of which the plaintiffs complain, were such as are usually made in putting in motion an engine, and that they

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were necessary to the prudent movement thereof, both with respect to persons who might be in the way of such moving train and to the safety of the engine and its parts, then defendant was under no obligation to notify plaintiffs of such intended movement or noise, either by flagman or otherwise, and failure to do so would not render defendant liable in this action." The giving of this instruction is assigned as error. The defendant had a right to move its trains upon its track. The plaintiff had an equal right to cross the defendant's track at the street crossing. Both of these rights cannot be exercised in an absolute and unrestricted manner. The right of each party is qualified and abridged to some extent by the right of the other. The right of each party must be exercised with a view to the right of the other, and in such manner as not unreasonably to interfere with it. Now to say as matter of law that the defendant was under no obligation, by flagmen or otherwise, to notify the plaintiff of an intended movement and noise in the exercise of its right, amounts to no less than saying as matter of law that the rights of defendant are paramount, and may be exercised without regard to the rights of the plaintiffs. Whether the defendants were under obligations to notify the plaintiffs of an intended noise and movement cannot be determined as a matter of law, but is a question of fact, to be determined from all the surrounding circumstances. If the noise and movement were likely to be attended with danger to the plaintiffs, then it was the duty of the defendant to exercise reasonable and ordinary care to prevent injury. And if the exercise of such reasonable and ordinary care under the circumstances would require notice in some manner to the plaintiffs, then it was the duty of the defendant, as a matter of law, to give such notice. The true doctrine upon this subject is stated in *Pennsylvania Railroad Company v. Barnett*, 59 Penn. St. 259. In that case the plaintiff was driving over a bridge which crossed the defendant's railroad nineteen feet above the track. Whilst the plaintiff was upon the bridge, the defendant's express passenger train from Philadelphia going west passed under it, whistling as it passed, at which plaintiff's horses took fright and ran away, overturning the carriage, throwing him out, injuring him seriously and permanently. In affirming the judgment for the plaintiff, the court say: "It is as clearly the duty of a railroad company, as it is of a natural person, to exercise its rights with a considerate and prudent regard for the rights and safety of others, and for injuries occasioned by negligence

both are equally responsible. Nor is it any excuse or justification that the act occasioning the injury was in itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. If there was no danger to the persons and property of those who might be travelling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning, in order that it might be avoided. If it would have been negligence in the plaintiff to drive upon the bridge just as the train was about to pass under it, had he been aware of its approach, then he was entitled to notice, and it was the duty of the company to give it. Whether therefore the company exercised proper care and diligence in running the train in order to prevent injury to the persons and property of those who were lawfully on the public road, and in the vicinity of the crossing, was a question for the jury." See also *Hill v. Portland & Rochester R. R. Co.*, 55 Me. 438; *Norton v. Eastern Railroad*, 113 Mass. 366; *Toledo, Wabash & Western Railway Co. v. Harman*, 47 Illinois, 298; *Manchester Railway Co. v. Fullerton*, 14 C. B. (N. S.) 53.

The appellee cites and relies upon *Farn v. Boston & Lowell Railway Co.*, 114 Mass. 350. In that case the plaintiff was passing along a highway under a railroad bridge. The decision was based expressly upon the ground, that as the railroad crossed the highway by a bridge, it had no rights in the highway, and consequently the same duties are not imposed upon it that are imposed when it passes over the highway itself in common with the traveller. That a different conclusion would have been reached if the railroad had crossed the highway at grade, as in this case, is evident from *Norton v. Eastern Railroad Company*, *supra*. The court erred in giving this instruction. The foregoing discussion sufficiently indicates our view of the rights of the parties, without a further consideration of the errors assigned.

Judgment reversed.

Petition for rehearing overruled.

Whitely v. Allen.

WHITELY v. ALLEN.

(56 Iowa, 224.)

Negotiable instrument — demand of payment.

No demand is necessary to bind an indorser of a note where the maker has removed from the State before its maturity, leaving no one to represent him.*

ACTION on a promissory note. The opinion states the case. The defendant had judgment below on demurrer.

Whiffin & Brown, for appellant.

J. P. Flick, for appellee.

ROTHROCK, J. The promissory note which is the foundation of the action is negotiable, and in the usual form. The indorsement by Allen, the defendant, is as follows: "Pay E. Houck, without notice."

It is not claimed by the plaintiff that a demand was waived by the indorsement. It seems to be conceded that a waiver of notice does not excuse a demand, and such appears to be the law. *Voorhis v. Atlas*, 29 Iowa, 49, and authorities there cited.

The amount in controversy being less than \$100, we are required by the certificate of the trial judge to determine the single question, whether, under the averments of the petition, the plaintiffs should be excused from making demand of payment of the maker of the note.

In 1 Pars. on Notes and Bills, 45, it is said: "If the maker removes from the place in which he resided and transacted business, to another jurisdiction, between the time a note is made and its maturity, the holder will not be obliged to go out of his own State in order to make a demand, either on the maker personally or at his new place of business, or of residence. Whether it will be necessary for the holder to use due diligence to find the maker's last and usual place of business, or of residence in the place which he has left, is unsettled, the authorities being conflicting. But we consider that it is more in accordance with the rules of law respecting demand to require that the holder should endeavor to find his last place of business or abode, and present the note there." The

* See *Herrick v. Baldwin* (17 Minn. 209), 10 Am. Rep. 161.

reason of the learned author for this view is "that it is no unfair or unreasonable presumption that the maker left, at his place of business within the State, means and arrangements for attending to the business which he began there, and left unfinished there." A number of cases are cited in a note to the above quotation from the text. Some of these cases hold that the removal of the maker into another State after the execution of the note, and before its maturity, *ipso facto*, excuses a demand at the place of business or residence of the maker at the time the note was made. Others hold that demand should be made at the last residence or place of business within the State.

The facts of this case do not require us to adopt either of these lines of decisions. The petition shows affirmatively that the maker left no one at his last usual place of residence in Iowa, "of whom a demand for payment could be made, and left no one authorized or empowered, or with means to pay said note when due * * * ." If the law requires a demand in all cases, and under all possible circumstances, it might properly be said that the rule being inflexible, there can be no excuse for want of demand at some place. But the law requires that the holder shall do no more than exercise due diligence to make the demand. It does not require that the maker should be followed into another State, and it seems to us if it affirmatively appears, as it does in this case, that the maker has left behind him no one to represent him or answer for him in any capacity, the law should not require the idle ceremony of a demand upon a mere stranger who may choose to be occupying the late residence, or it may be upon the empty walls of an untenanted house. In our opinion the demurrer to the petition should have been overruled.

Judgment reversed.

Chamberlain v. Clayton.

CHAMBERLAIN V. CLAYTON.

(55 Iowa, 331.)

Office and officer—personal liability of public officer.

The trustees of a State institution are not personally liable for a mere wrongful and illegal breach of contract.*

ACTION of damages for breach of contract by trustees of the State Institution for the Deaf and Dumb. The opinion states the point. The defendant had judgment below on demurrer.

N. M. Pusey, for appellant.

Wright & Baldwin, for appellee.

ROTHROCK, J. It will be observed that it does not appear from the allegations of the first and second counts that the defendants are trustees of the Institution for the Deaf and Dumb. For aught that appears therefrom, the defendants were mere strangers, and under the first count were guilty of a wicked and malicious conspiracy by which they prevented the plaintiff from performing his contract; and in the second count it is alleged they wrongfully, unjustly, and illegally hindered the plaintiff from entering upon the duties of his employment under his contract. The District Court held that these counts each presented a good cause of action. In the third count however it is averred that the defendants were trustees of the institution, and that they, as trustees, neglected and refused to perform their duty, by wrongfully, unjustly, and illegally preventing the plaintiff from performing his contract. Section 1686 of the Code provides that the trustees of the Institution for the Deaf and Dumb "shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers, servants, and necessities for the institution, and perform all other acts necessary to render it efficient, and to carry out the purposes of its establishment."

We have then the question whether the trustees are liable to a personal action for damages at the suit of a teacher or superintendent whom they have employed, for wrongfully, unjustly, and illegally refusing to allow him to enter upon the employment? The de-

* See *Jones v. Loving* (55 Miss. 109), 30 Am. Rep. 508.

murrer to the petition raises this question, which we are called upon by the record before us to determine. It is not averred in the third count of the petition that the defendants acted corruptly or maliciously. For aught that is averred therein they may have been performing what they honestly believed to have been an official duty, and still their act may have been wrongful, unjust and illegal as to the plaintiff.

Much of the argument of counsel is devoted to a discussion of the question as to whether or not the act of defendants in preventing the plaintiff from entering upon the employment was of a judicial or ministerial character. Counsel for appellant contends that if it be conceded that the making of the contract of employment was of a *quasi* judicial character, it cannot be claimed that the subsequent act of dismissal, or rather refusal to allow the plaintiff to enter upon the employment, was any other than purely ministerial. That the duty of employing teachers requires such judgment and discretion as to call into exercise functions to say the least *quasi* judicial, as defined in the reported cases on that question, we think can admit of no doubt. If so, all the authorities agree that there can be no personal liability of the officer unless the act complained of be wilful, corrupt or malicious, or without the jurisdiction of the officer. *Wasson v. Mitchell*, 18 Iowa, 153; *Muscutine West. R. Co. v. Horton*, 38 id. 33.

Whether there be such liability, as against an officer exercising *quasi* judicial functions, even where he acts corruptly or maliciously, we need not determine in this case. We have recently held that a purely judicial officer is not liable to a civil action for a judicial act even though it be alleged that the act complained of was corrupt, fraudulent, or malicious. *Jones v. Brown*, 54 Iowa, 74; s. c., 37 Am. Rep. 185; and see *Henke v. McCord*, 55 Iowa, 378.

We are next to inquire whether the act of discharging the plaintiff, or what we regard as the same thing, cancelling the contract with him before he commenced the superintendency, was a ministerial act. The statute above quoted gives the general supervision of the institution to the trustees, and they are charged with the duty of performing all acts necessary to render the institution efficient. They owe a duty to the State and the public, as well as to the employees under their charge. If in the honest exercise of their discretion and judgment they should discharge an employee, they cannot be held liable to a civil action, because the act is not of a

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purely ministerial character, like the issuance of an execution by a justice of the peace, or the levy of a writ by a sheriff, or the like. If they may discharge an employee after entering upon the employment, they may also cancel a contract with one not yet having commenced to labor for the institution, upon grounds which may appear to them to be satisfactory. The same judgment and discretion, and power to determine, are required to be exercised in one case as in the other.

Without further extending the discussion, our conclusion is that the District Court did not err in sustaining the demurrer to the third count in the petition.

Judgment affirmed.

GILBERT V. SANDERSON.

(56 Iowa, 842.)

Contract — to settle mortgage — cancellation.

A contract by one to settle a mortgage made by the other imposes a personal liability to pay the debt; but may be cancelled by the parties before knowledge and acceptance by the mortgagee.

ACTION on contract. The opinion states the case. The plaintiff had judgment below on demurrer.

Robinson & Milchrist and C. L. Ward, for appellant

Lot Thomas, for appellee

SEEVERS, J. S. S. Warner executed certain notes to Homer A. Smith, and secured the same by mortgage on real estate. The notes and mortgage were assigned to the plaintiff. There was a foreclosure and sale of the mortgaged premises, but only a portion of the indebtedness was realized. This action was brought to recover the amount of the indebtedness remaining unpaid. The action was based on the following written instrument:

“SIOUX RAPIDS, IOWA, *January 13th*, 1876.

“I, James Sanderson, do hereby agree to settle a mortgage now held against the north half of the north-east quarter and the south-

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west quarter of section eight (8), township ninety-three (93), range thirty-six (36), west of the fifth principal meridian, when due; said mortgage of seven hundred dollars (\$700), held by Homer A. Smith, and due in seven annual payments of one hundred dollars (\$100) each.

“JAMES SANDERSON.”

“For a valuable consideration I hereby assign to A. L. Gilbert the foregoing contract and all my right and interest therein, with free power to enforce the same, and commence and prosecute suit thereon, in his own name.

“S. S. WARNER.”

The defendant pleaded the mortgage had been fully satisfied and discharged by the foreclosure and sale of the mortgaged premises, and also

“3. For a further defense to the claims of the plaintiff, defendant states that on or about the — day of — —, A. D. 1876, and before said S. S. Warner had assigned the said obligation to plaintiff, and before plaintiff or his assigns had any knowledge thereof, and while the same was owned and held by said Warner, and before said notes and mortgage, executed and delivered by said Warner, were transferred to the plaintiff, and while the same were held and owned by said Smith, payee thereof, that defendant and said Warner entered into an agreement — not in writing — whereby defendant agreed to surrender to said Warner all the claims and interest of defendant in said mortgaged premises, including a deed therefor, executed by said Warner to defendant, and not recorded, and certain certificates of the sale of said premises for delinquent taxes, duly executed by the treasurer and auditor of Buena Vista county, and said Warner agreed to release defendant from all further liability on account of said written obligation of defendant, and to cancel the same and hold it for naught. Defendant further states that he executed said agreement on his part and surrendered to said Warner said deed, and transferred to him said certificates of tax sale, and performed on his part all the requirements of said agreement; that said Warner accepted said deed and certificates and entered into the possession of said premises, and defendant thereby became released from all liability on account of said obligations.”

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The demurrer assailed the sufficiency of the foregoing portions of the answer, and the questions discussed by counsel will be now considered.

I. The appellant insists there could not be a second foreclosure of the mortgage, and therefore it was "settled" or discharged, within the meaning of the writing upon which the action is based, when the foreclosure was obtained and the premises sold. In this view we do not concur. The clear import of the writing is that the defendant would pay or cause to be paid the indebtedness secured by the mortgage. The object being to thus, in so far as the parties could, release Warner from all personal liability, or at least to indemnify him from loss in case the mortgaged premises were insufficient to pay the indebtedness. If this was not the object and intent of the parties to the contract, they went through a useless form and ceremony.

II. Conceding the mortgagee, Smith, or the plaintiff, his assignee, could avail themselves of the benefits conferred by the contract, the remaining question is whether the mortgagor, Warner, for a valuable consideration, could release and discharge the defendant from the obligation if done before the mortgagee or his assignee had knowledge of or accepted the contract, or whether it was irrevocable unless the mortgagor or the plaintiff assented to the revocation.

The authorities are not agreed as to the grounds upon which the person agreeing to pay the mortgage is held liable. In some of the adjudicated cases it has been held the contract of indemnity, or to pay the mortgage, operates as a collateral security, obtained by the mortgagor, which by equitable subrogation inures to the benefit of the mortgagee. This being so, it has been held to follow that the mortgagee can only recover a personal judgment against the person who agreed to pay the debt, when the mortgagor holds an obligation which will support the judgment. 1 Jones on Mortgages, § 762; *Crowell v. Currier*, 12 E. C. Green (27 N. J. Eq.), 152.

In the case at bar, Warner, the mortgagor, had released the defendant from all liability on the contract. Therefore the doctrine of subrogation cannot apply for the reason the contract as to Warner must be regarded in the same light as if it had never existed. There is nothing on which a judgment can be supported.

In New York there are cases which hold the liability is incurred on the ground above stated, and others which hold it is incurred

upon the broad principle, that if one person make a promise to another for the benefit of a third person, the latter may maintain an action on such promise. *Garnsey v. Rogers*, 47 N. Y. 233 ; s. c., 7 Am. Rep. 440.

It is upon the last ground it is said the cases in this State are based. *Ross v. Kennison*, 38 Iowa, 396. There are *dicta* cited in *Garnsey v. Rogers*, it is said, indicating the contract is irrevocable unless the mortgagee assents to the revocation. No such question however was in the case.

The question under consideration arose in *Simpson v. Browne*, 6 Hun, 251, and it was there held in substance the contract could not be released by the mortgagor. This case, on appeal (68 N. Y. 355), was reversed on several grounds, among which was that the mortgagor could release the indemnity before it had been assigned to the mortgagee, or came into his hands. To the same effect is *Stevens v. Casbacker*, 8 Hun, 116.

It has also been held, where one person makes a promise to another for the benefit of a third person, the person to whom the promise is made may execute a valid release of such promise before it has been accepted by the latter. *Dunham v. Bishoff*, 47 Ind. 211; *Kelly v. Roberts*, 40 N. Y. 432.

In the case at bar the contract primarily was made to indemnify the mortgagor, Warner. It may be the plaintiff was entitled to the benefits of the contract, but this depended upon the question whether he desired to avail himself thereof. He could not be forced to do so. Now before he had knowledge any such contract was in existence, the parties who made it agreed upon a valuable consideration to release the obligation thereby assumed. Having the power to enter into such contract it would seem to follow they could enter into another whereby the former ceased to be of any force or effect, unless in the meantime the person for whose benefit it was made in some manner has indicated he accepts the contract, or it can be implied he did so. By so doing he acquires the rights and assumes the burdens incident thereto.

It is said the court below based its ruling on something that is said in *Corbett v. Waterman*, 11 Iowa, 86. The question in that case was not in the one before us, and we have great doubt whether there is any thing said by way of argument which has any material bearing on the case at bar.

The appellee suggests the answer shows the real estate was con-

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veyed by Warner to the defendant and that the latter has never re-conveyed it. Therefore it is said the legal title is still vested in him. This may be true, but it is clear from the answer that the defendant has no beneficial interest in the real estate. At most he holds the naked legal title in trust. Conceding a consideration was necessary to support the release as against the plaintiff, the answer shows there was such consideration independent of and in addition to the delivery of the deed. Upon the ground herein indicated the demurrer should have been overruled.

Judgment reversed.

LINTON V. CROSBY.

(18 Iowa, 286.)

Execution — exemption — head of family.

A husband living as a boarder for seven years, separate from his wife and not contributing to her support, they having no children, is not the "head of a family," within a statute of exemption.

ACTION to recover exempt property. The opinion states the case. The defendant had judgment below.

D. S. Wilson and Murdock & Larkin, for appellants.

L. O. Hatch and Jas. O. Crosby, for appellee.

SEEVERS, J. For the purposes of this case it must be conceded if Dr. Linton at the time he died was the head of a family, the property in controversy, or some of it, was exempt from execution during his life-time. It is provided by statute: "If the debtor is a resident of this State and is the head of a family" certain personal property named in the statute shall be exempt from execution. Rev., § 3305, Code, § 3072.

"Where the deceased leaves a widow all personal property which, in his hands as the head of the family, would be exempt from execution * * * shall be set apart as her property in her own right and be exempt as in the hands of the decedent." Code, § 2371.

Counsel for appellant has called our attention to several cases determined by this court relating to the homestead and its exemption:

the argument being as we understand that under Rev., § 2277, it was the homestead of "every head of a family," that was exempted from judicial sale, and therefore, as the same language is used in Code, § 3072, the definition or meaning of "the head of the family" as applied to homestead exemptions should be followed in construing the section of the Code under consideration. We are not prepared to assent to this proposition. Both the Rev., § 2278, and Code, § 1989, provide that a "widow or widower, though without children, shall be deemed the head of a family, while continuing to occupy the house used as such (home) at the time of the death of the husband or wife." This statute, creating, as it does, special heads of families, must necessarily have an important bearing in construing the homestead exemption. That whatever construction may have been given to the statute exempting the homestead from judicial sale is not applicable or should not control the statute exempting personal property, is well illustrated by *Van Doran v. Marden*, 48 Iowa, 186. In that case certain personal property was exempt from execution in the hands of the plaintiff's first husband, and the title thereto vested in the plaintiff as his widow, but it was held not to be exempt after her second marriage, on the ground she was not the head of a family. Now if she had continued to occupy the homestead after the death of her first husband it could not have been sold at judicial sale because of her second marriage. Rev., § 2295, Code, 2007.

We have been called upon several times to construe the statute under consideration. See *Whalen v. Cadman*, 11 Iowa, 226; *Ellsworth v. Ellsworth*, 33 id. 164; *Scholes v. Murray Iron Works Co.*, 44 id. 190; *Tyson v. Reynolds*, 52 id. 431; and *Arnold v. Waltz*, 53 id. 706; s. c., 36 Am. Rep. 248. But little aid however can be derived from these cases, because the facts upon which they are based are materially different from those in the case at bar.

Counsel for appellant seem to rely largely on *Ellsworth v. Ellsworth*, just cited. The facts in that case were the husband and wife were living together at the death of the former and it was conceded the property in controversy could not "be deemed assets and administered upon as such" unless the rights of the "widow had been abandoned or waived by her conduct or declarations" since her husband's death. The point in *Scholes v. Murray Iron Works Co.* was as to whether Howard was a resident of the State. There was no controversy as to whether he was a head of a family.

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The question in the case before us may be thus stated : When a husband and wife have lived separate and apart for seven years preceeding his death, and he neither contributed nor was asked to contribute to her support, and during said time he lodged in his office and boarded in the family of others, was he at the time he died the head of a family within the meaning and intent of the statute ? A family is the collective body of persons who live in a house under one head or manager." BECK, C. J., in *Tyson v. Reynolds*. A person may be the head of a family although he has never been married. WRIGHT, J., in *Whalen v. Caulman*, before cited. The converse of this proposition may also, we think, be true. In the absence of a statute so providing it is difficult to see why a person boarding in the family of others and lodging in his office for seven years can at the expiration of that time be regarded as a family, or the head of one. It is true a person may be a boarder and yet the head of a family. But in order to constitute him such the boarding must be regarded as of a temporary character. It may be if Dr. Linton had contributed to the support of his wife, he, under the statute, was the head of a family. The mere fact he was liable for her support should not, we think, make him the head of a family. No family relation as generally understood existed between himself and wife. The policy and intent of the statute is to exempt certain property because the support of a family, great or small, is cast upon the head thereof. Such family must have an actual existence, as distinguished from one that exists theoretically only.

It may also be, if the separation was of a temporary character, or there was any evidence of an intent to resume the marital relation, such fact would form an element entitled to consideration. Nothing of this kind appears. On the contrary, but one conclusion can be fairly drawn, and that is the separation was final and so intended to be.

Affirmed.

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GUELICH V. NATIONAL STATE BANK OF BURLINGTON.

(56 Iowa, 434.)

Agency — bank receiving draft for collection at a distance — negligence of sub-agent.

A bank, receiving for collection a draft payable at a distant place, and transmitting it to its correspondent bank at that place, is not liable for loss through the negligence of the latter: (*See note, p. 114.*)

ACTION to recover amount of a draft. The opinion states the case. The plaintiff had judgment below.

Hall & Huston, for appellant.

P. Henry Smyth & Son, for appellee.

BECK, J. I. The paper in question in this suit was a foreign bill drawn in Munich, Westphalia, upon New York, and was deposited with defendant for collection. In the usual course of business of the bank, it was sent by defendant to its correspondent, the Metropolitan Bank of New York. It may be conceded, in the view we take of the case, that for the reason the paper was not presented for payment and protested for non-payment by the New York bank within the time required by law, the drawers and indorsers of the bill were discharged. Counsel for defendant insist that for the reason the paper was over due when received by defendant no liability attaches for failure to protest it for non-payment. They also argue that defendant as a National bank is not liable for the default charged in the petition. These and other questions discussed by counsel we need not consider, as the decision of the case turns upon another point arising upon facts we have just stated.

II. The question which in our opinion is decisive of the case, is this: Is defendant liable for the default of its correspondent, the New York bank, in failing to present and protest the bill in due time?

The paper was deposited with defendant for collection; it was payable in New York. The course of business of defendant, and all other banks, is, in such cases, to make collections through correspondents. They do not undertake themselves to collect the bills, but to intrust them to other banks at the place payment is to

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be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore authorizes the bank with whom he deals to do the work of collection through another bank.

We will now inquire as to the relations existing between the bank charged with the collection of the paper, and the holder depositing it with the first bank.

The bank receiving the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the sub-agent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection.

The paper remains the property of the customer, and is collected for him ; the party employed, with his assent, to make the collection, must therefore be regarded as his agent.

A sub-agent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the sub-agent and the principal, who must therefore seek a remedy directly against the sub-agent for his negligence or misconduct. Story on Agency, sections 217 and 313. These familiar rules of the law applied to the case, relieve it of all doubt when considered in the light of legal principles.

III. But there is conflict in the adjudged cases upon the question of the direct liability of the bank employed as a sub-agent to the holder of the paper, for negligence or default in its collection. The preponderance of the authorities strongly supports the conclusion we have just reached in this case. The following cases are to this effect : *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 177 ; *Fabens v. Mercantile Bank*, 23 Pick. 330 (34 Am. Dec. 59) ; *Lawrence v. Stonington Bank*, 6 Conn. 521 ; *East Haddam Bank v. Scovil*, 12 id. 303 ; *Hyde et al. v. Planters' Bank*, 17 La. 560 ; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13 ; *Aetna Insurance Co. v. Alton City Bank*, 25 Ill. 243 ; *Slacy v. Dane County Bank*, 12 Wis. 629 ; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648 ; *Agricultural Bank v. Commerce Bank*, 7 Sm. and M. 592 ; *Bowling v. Arthur*, 34 Miss. 41 ; *Jackson v. Union Bank*, 6 Har. and J. 146 ; *Citizens' Bank v. Howell*, 8 Md. 530 ; *Bank of Washington v. Triplett*, 1

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Pet. 25 ; *Mechanics' Bank v. Earp*, 4 Rawle, 384 ; *Bellemire v. U. S. Bank*, 1 Miles, 173 ; s. c., 4 Wheat. 105 ; *Daly v. Butchers' & Drovers' Bank*, 56 Mo. 94 ; s. c., 17 Am. Rep. 663 ; *Smedes v. Bank of Utica*, 20 Johns. 373.

IV. The following cases hold that the bank to whom a bill or note is sent for collection by another bank is not the agent of the owner of the paper : *Allen v. Merchants' Bank*, 22 Wend. 215 ; *Downs v. Madison Co. Bank*, 6 Hill, 648 ; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld. 459 ; *Commercial Bank v. Union Bank*, 1 Kern. 203 ; s. c., 19 Barb. 391 ; *Ayrault v. Pacific Bank*, 47 N. Y. 570 ; s. c., 7 Am. Rep. 84 ; *Indig v. Brooklyn City Bank*, 16 Hun. 203 ; *Reeves v. St. Bank of Ohio*, 8 Ohio St. 465.

V. *Bradstreet v. Everson*, 72 Penn. St. 124 ; s. c., 13 Am. Rep. 665 ; *Lewis v. Peck & Clark*, 10 Ala. 142, and *Pollard v. Rowland*, 2 Blackf. 22, are sometimes quoted as according with the cases last cited. We think they are distinguished from all the conflicting cases above referred to, by the fact that the parties receiving the paper, being collecting agents only, became bound either by express or implied contracts to make the collections themselves. In the other cases there was no such contract shown, but on the contrary it appears that banks in their usual course of business make collections of notes and bills at distant places through their correspondents, with the implied assent of the parties depositing such paper with them. The collecting bank thus becomes the sub-agent of, and is responsible to, the owners of the paper. See Story Agency, § 217 a, and cases cited.

The decision in *Bank of Washington v. Triplett*, 1 Pet. 25, and *Mechanics' Bank v. Earp*, 4 Rawle, 384, are based upon the ground that the paper in each case was deposited for transmission and not for collection, that is, the receiving bank undertook to transmit the paper to its correspondent and not to collect it. This very element, in our opinion, is in all the cases cited to support our position and in the case before us. Under the usage of banks, paper received for collection at the places other than the town or city where the receiving bank is located is received under the implied contract that it is accepted for transmission to correspondents at the place where it is payable. These cases, we think, are in accord with the other decisions we have cited in support of our views.

Mackersey v. Ramsey, 9 Cl. & F. 818, is not in conflict with the doctrine we adopt. In that case the receiving bank expressly un-

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undertook to forward the paper, and upon its payment to place the amount thereof to the credit of the depositor, and for the performance of its undertaking it was to receive a commission. The paper was collected by its correspondent, who failed soon after, and the bank receiving the paper from its customer never received the funds. Surely under this contract to credit its customers with the amount of the paper upon payment, the bank would be bound to give him credit when it was paid to its correspondent, and thus became directly liable for the money to the customer.

Allen v. Merchants' Bank, 22 Wend. 215 (34 Am. Dec. 289), which established the doctrine afterward followed in New York, was announced by a divided court, fourteen senators concurring in the decision and ten, with Chancellor WALWORTH, dissenting. The case however has been uniformly followed in New York.

Hoover v. Wise, 91 U. S. 308, cited as in conflict with our views, was decided upon these facts: A money demand was first delivered by the owner to a New York collecting agency with instructions to collect the debt. It was forwarded by the agency to lawyers in Nebraska City for collection, who, knowing the insolvency of the debtor, persuaded him to confess judgment upon the claim. The money was collected and forwarded to the agency in New York, but it never reached the hands of the creditor. Proceedings in bankruptcy were instituted within four months after the confession and prosecuted to a decree. The action was brought against the creditor by the assignee in bankruptcy to recover the money collected, on the ground that he had knowledge of the insolvency of the debtor when judgment was confessed by him. The court held that the attorneys at Nebraska City were not the agents of the creditor, who therefore was not chargeable with notice of the debtor's insolvency through the knowledge they possessed upon that subject. The facts hardly authorize the conclusion that the creditor assented to the employment of a sub-agent in Nebraska City, who should act for him. While it appears that he was informed that it would be sent to an attorney in Nebraska, and that the agents received collections to be made by suits in different parts of the country, it is not shown that under the usual course of business, the New York agents intrusted the management of collections wholly to their correspondents. The business of collecting claims by actions demands professional skill; the collection of paper, as is always done by banks, requires its presentation and protest if not paid, and

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maker and protest ; and that the defendant had pursued that course. The court below decided that if there were any negligence on the part of the notary, the evidence was immaterial, and that the usage did not constitute a defense. The Supreme Court reversed this decision, and held that the evidence was admissible. 'It would, we think,' said the court, 'have authorized the jury to find an implied agreement or assent to the employment of a sub-agent or notary public for the purpose of making a demand on the maker, requiring only in the collecting bank due diligence and care in selecting the notary, or a general usage binding certainly those who were conversant of it. It is no sufficient answer to this to say that it was not absolutely necessary to employ a notary in a case like the present, to certify to the demand and protest. If this was the well-established course of business, and known to the plaintiffs, when they sent to the defendants this note for collection, they must be bound by it.' 10 Cush 582-7. The court also said, that when the nature of the business in which an agent is engaged, requires for its proper and reasonable execution, the employment of a sub-agent, the principal agent is not responsible for the default of the sub-agent, provided a proper one be selected ; and it was of opinion that if the usage of the banks authorized the employment of a sub-agent holding an official character, it then became a case of sub-agency, with its incidents

"In the case at bar there was no proof of any general usage of bankers at Natchez as to the employment of notaries public in the presentment and protest of notes left with them for collection. But we have before us the decisions of the Supreme Court of Mississippi, and they are of equal potency to limit the liability of the bankers for the negligence of the notary. We can look into those decisions to ascertain what the law is in that State, and how far it has modified what would otherwise be deemed the general law on any particular subject. By them we are informed that it is the settled law of the State that 'a bank receiving commercial paper, as an agent for collection, properly discharges its duties, in case of non-payment, by placing the paper in the hands of a notary public to be proceeded with in such manner as to charge the parties to it, and secure the rights of the real owner ; and that the bank is not liable in such cases for the failure of the notary to perform his duty.' This is the language used by that court in *Bowling v. Arthur*, 34 Miss. 53 ; and in support of it the cases of *Tiernan v. Commercial Bank of Natchez*, 7 How. (Miss.) 648, and of *Commercial Bank of Manchester v. Agricultural Bank*, 7 S. & M. 592 are cited. And the court adds, that these cases decide that the notary is the sub-agent of the holder, through the banks, and as such is liable to him ; and it is satisfied that the rule declared in them is correct."

"Judged by the law of Mississippi, the bankers, Britton & Koontz, discharged their duty to the plaintiff when they delivered the notes, received by them for collection, to the notary public. There is no question as to his habits or qualifications. He was not connected in business with the bankers, nor employed by them except in his official character. What more could they have done, as intelligent and honest collecting agents, desirous of performing all that was required of them by the law, ignorant as they were of the residence or place of business of the maker of the notes, and having unsuccessfully made diligent inquiry for them ?"

"It is enough here that the notary was not in this matter the agent of the bankers. He was a public officer, whose duties were prescribed by law, and when the notes were placed in his hands, in order that such steps should be taken by him as would bind the indorsers, if the notes were not paid, he became the agent of the holder of the notes. For any failure, on his part to perform his whole duty he alone was liable ; the bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection, in the conduct of a suit brought upon them."

See *Bank of Louisville v. First Nat. Bank of Knoxville* (8 Baxt. 101) ; a. c., 85 Am. Rep. 691, and note, 695.

Brown v. Wyman.

BROWN V. WYMAN.

(56 Iowa, 452.)

Mechanic's lien — "improvement upon land" — breaking prairie.

Breaking prairie is not an "improvement upon land" for which a mechanic's lien will lie.

ACTION upon mechanics' lien. The opinion states the point. The plaintiff had judgment below.

Starr & Harrison, for appellant.

J. S. Root, for appellee.

DAY, J. The court declared the lien for breaking a first lien upon the building, and a lien upon the land subject to the payment of the purchase-price. The appellant claims that breaking of prairie land is not an improvement on land, within the meaning of section 2130 of the Code, for which a mechanic's lien can be established. Although this question is directly in the case, and if determined adversely to the right to a lien, decisive of it, yet the appellee has paid no attention to the question in his argument. We regret the necessity of determining a question of first impression, upon a bare presentation of it on one side, and without any argument whatever from the other side.

Section 2130 of the Code secures a lien to "every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for, any building, erection or other improvement upon land." Does this provision of the statute give a lien for the mere turning over of the soil with a plow? We feel constrained to hold that it does not. The lien is given for any improvement upon land. Now, whilst breaking and turning over of the soil may constitute an improvement of the land, it cannot in any just sense be denominated an improvement *upon* the land. The breaking of the prairie is necessary to the growth of crops, but not more necessary than the annual plowing which precedes the planting of crops. If a lien should be allowed for the first breaking of the prairie, we are unable to see upon what principle it would be denied for the subsequent plowings, which are indispensable to the proper cultivation of the soil. Fertilizers greatly improve

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land. It would probably not be claimed that a lien would be acquired for hauling manure upon land. It is not proper for us now to undertake to determine to what classes of improvements section 2130 applies. The only question which is before us is, does it apply to the plowing of the soil? We think that to give it such an application would extend it beyond what was contemplated by the legislature, and beyond what its language, fairly construed, justifies. In allowing the lien, we think, the court erred.

Judgment reversed.

WING V. GLICK.

(56 Iowa, 473.)

Agency — contract by public officer — execution.

▲ contract, phrased, "We promise to pay," and signed by two with the respective addition of "president school board and secretary school board," but containing no reference to any school district, is a personal obligation, not variable by parol.

SUFFICIENTLY reported, 37 Am. Rep. 142.

BEVER V. BROWN.

(56 Iowa, 565.)

Arbitration and award — misconduct of arbitrator — action for services.

An arbitrator who has so misconducted that his award was rendered unavailing cannot recover for his services.

SUFFICIENTLY reported, 37 Am. Rep. 188.

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BARTON V. THOMPSON.

(56 Iowa, 571.)

Evidence — of good character in civil action.

In a civil action for maliciously burning property, proof of the defendant's good character is inadmissible. (*See note, p. 120.*)

ACTION for maliciously burning property. The opinion states the point. The defendant had judgment below.

D. W. Poindexter and Starr & Harrison, for appellant.

C. D. Ellis and L. M. Ryce, for appellee.

DAY, J. L. The court instructed the jury, in substance, that evidence of the defendant's prior good character was to be weighed and considered by them, and if therefrom a reasonable doubt was raised it was their duty to find for the defendant. In civil cases evidence of general character is not admitted unless the nature of the action involves the general character of the party, or goes directly to affect it. 1 Greenl. Ev., § 54, and authorities cited in note 3. But "generally in actions of tort, where the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it." *Id.* The better doctrine seems to be that evidence of good character should be confined to cases where intention is the point in issue, and the proof consists of slight circumstances. This is the rule which was established in the leading case of *Ruan v. Perry*, 3 Cai. 120. Beyond the rule recognized in this case, the best considered cases have not extended the admissibility of evidence of good character in a civil action. That such evidence is not entitled to consideration in a case such as this is clearly established by the following authorities. *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. 673; *Schmidt v. N. Y. Ins. Co.*, 1 Gray, 535; *Attorney General v. Bowman*, 2 B. & P. 532; *Humphrey v. Humphrey*, 7 Conn. 116. The court erred in giving the instructions under consideration.

[Omitting an unimportant consideration.]

For the error considered in the first branch of this opinion the judgment is reversed.

Judgment reversed.

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NOTE BY THE REPORTER.—See *Dudley v. McCluer*, 65 Mo. 241; s. c., 27 Am. Rep. 373; *Gebhart v. Burkett*, 57 Ind. 378; s. c., 26 Am. Rep. 61; *George v. Pücher*, 28 Gratt. 200; s. c., 26 Am. Rep. 350.

In *Howler v. Aetna Fire Ins. Co.*, 6 Cow. 674, the defendant charged the plaintiff with a fraudulent over-valuation of insured property. Evidence of his good character was rejected. SAVAGE, C. J., said: "If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties." *Gough v. St. John*, 16 Wend. 646, was an action for injury to property, and it overruled *Ruan v. Perry*, 8 Cal. 120. *Schmidt v. N. Y. Ins. Co.*, 1 Gray, 535, involved the charge that the plaintiff fraudulently burned the insured property. *Attorney-General v. Bowman*, 2 B. & P. 532, was an information for keeping false weights and attempting to corrupt an officer. The court said: "In a direct prosecution for a crime such evidence is admissible; but when the prosecution is not directly for the crime, but for the penalty, it is not." *Porter v. Sellar*, 23 Penn. St. 424, was an action for assault and battery with a knife.

In *Rogers v. Lamb*, 8 Blackf. 155, and *Baker v. Hopkins*, 1 A. K. Marsh. 587, actions of malicious prosecution, such evidence was rejected.

Character is not in issue on the question whether a debt was for money lost at play *Thompson v. Bowie*, 4 Wall. 471.

The best discussion of this point on principle is in *Smets v. Plunket*, 1 Strob. (S. C.) 872, an action involving a possible imputation but not a direct charge of fraudulent appropriation of property and false accounts of sales, where evidence of the claimant's good character was rejected. The court said: "It is plain that in civil cases, where the nature of the action itself does not involve the general character of a party, evidence of that character cannot be offered to contradict an imputation of dishonesty or even of fraud. The transaction presented in an ordinary civil case must depend upon its circumstances, and not upon the character of the parties. In such a case, no matter how serious a moral delinquency may be involved in a fact, and how much the establishment of that fact may affect a party's reputation, he cannot invoke the aid of his previous reputation to disprove the fact." "Examinations in court into general character, according to reputation, usually distinguish only between the two classes, the good and the bad, without nice discrimination between the infinite degrees and varieties which exist of either class. Of most persons there is really no general reputation as to character, and of some the general reputation is widely different from the truth, which a full knowledge of their motives, principles and habits would disclose. Sometimes upon trials the good are overthrown by unexpected assault, and often the bad are burnished and strengthened by the ready testimony which their influence procures in their favor, whilst many of their neighbors, who think ill of them, shrink from being examined, or being examined, cannot say that the suspicions which they entertain, and which they feel rather than know that others also entertain, have been uttered so as to constitute a bad reputation. In investigations concerning character, feeling and prejudice are more often exhibited than in inquiries upon any other subject; the number of witnesses is often extended far beyond the limit which upon other topics the court would indulge; and if there be contrariety of opinion, the matter usually is left at last in great uncertainty. * * * If in every case where an act of dishonesty is imputed the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case." The court distinguished *Ruan v. Perry*, *supra*, and declined to express an opinion whether it was good law. *Smets v. Plunket* was followed in *Awkins v. Gault*, 5 Rich. 151, where proof of the good character of a party was held inadmissible in an action charging fraud as against creditors. The court *obiter* remarked that if the proof of fraud was purely circumstantial, such evidence would be competent; citing *Smets v. Plunkett*, which as we have seen does not so hold.

Ruan v. Perry is also disapproved in *Thayer v. Boyle*, 30 Me. 475, an action of malicious trespass; *Wright v. McKee*, 37 Vt. 181, an action substantially charging embezzlement; *Church v. Drummond*, 7 Ind. 19, an action involving a charge of fraud against creditors:

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Ward v. Herndon, 5 Port. (Ala.) 382; and *Pratt v. Anderson*, 4 Comst. 493, an action of crim. con. The like doctrine is laid down in *Humphrey v. Humphrey*, 7 Conn. 116, an action of divorce for adultery; in *Morris v. Hazlewood*, 1 Bush, 208, an action involving a charge of robbery; in *Gutzwiller v. Lackman*, 23 Mo. 168, an action involving a charge of fraudulent conveyance; and in *Lowell v. McDonald*, 58 Miss. 251, an action of assault and battery.

On the other hand: In *Henry v. Brown*, 2 Helsk. 313, an action of trespass for killing a helter, the defendant was allowed to prove his good character. This was founded on *Ryan v. Perry*, 3 Cal. 120, and like that was a case of circumstantial proof. The court also cited the opinion of Chancellor WALWORTH, in *Townsend v. Graves*, 3 Pal. 453, which was also founded on *Ryan v. Perry*, *supra*. The chancellor there said: "That where a party is charged with a crime, or any other act involving moral turpitude, which is endeavored to be fastened on him by circumstantial evidence, or by testimony of witnesses of doubtful credit, he may introduce proof of his former good character for honesty and integrity, to rebut the presumption arising from such evidence, which it may be impossible for him to contradict or explain." And the Tennessee court said: "The rule thus laid down by the learned chancellor meets our approval, and we think is well sustained by the soundest reasons, based in the philosophy of human action and the well-established course of human conduct." This was followed in *Spears v. International Ins. Co.*, 1 Baxt. 370, an action on a fire insurance policy, where the defense was the plaintiff himself had procured the property to be burned.

STATE V. HOLMES.

(33 Iowa, 533.)

Statutory construction — "written order" — telegram ordering adjournment of court.

A telegram from a judge to the clerk of the court, ordering an adjournment, is a "written order," and warrants the adjournment.

CONVICTION for keeping house of ill-fame. The opinion states the case.

John B. Kaye, for appellant.

Smith McPherson, attorney-general, for State.

SEEVERS, J. I. The defendant was tried and convicted at the March term, 1881. The court should have convened on the seventh day of that month, but as the judge did not arrive at the county seat on that day the clerk adjourned the court until the next day, and on that day for the same reason until the ninth day of March. At three and a half o'clock P. M. of said last day the clerk received from the judge the following telegram:

"CALMAR, IOWA, March 9th, 1881.

"To M. M. Harden, Clerk:—I have made and sent you a writ-

ten order adjourning court until to-morrow morning, nine o'clock. Adjourn it accordingly.

“E. E. COOLEY, *Judge.*”

A few minutes before five o'clock P. M. of said day the clerk adjourned the court until March 10th, at 9 o'clock, A. M. At a quarter past six o'clock P. M. of March 9th the clerk received by mail the following: “Owing to the inability of the undersigned to reach the county seat in time to open court to-day, it is therefore hereby ordered that the District Court for Winneshiek county be and the same is hereby adjourned until Thursday, the 10th day of March, 1881, at 9 o'clock A. M. Dated March 9, 1881.

“E. E. COOLEY, *Judge District Court, 10th Judicial District, Iowa.*”

The defendant objected to being tried at said term because the court at five o'clock P. M. of March 9th by operation of law stood adjourned until the next term and could not legally convene on the 10th day of March. The objection was overruled. The statute provides: “If the judge does not appear on the day appointed for holding court the clerk shall make an entry thereof on his record and adjourn the court until the next day, and so on until the third day. * * * If the judge does not appear by five o'clock of the third day * * * the court shall stand adjourned till the next regular term. If the judge is sick or for any other sufficient cause is unable to attend court at the regularly appointed time he may by a written order direct an adjournment to a particular day therein specified, and the clerk shall on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed.” Code, §§ 167, 168, 169.

As the order sent by mail was not received by the clerk until after five o'clock P. M. of the 9th day of March, it will be conceded it cannot have any bearing on the question to be determined. The only question then is whether the telegram is a written order as contemplated by the statute, and its sufficiency.

Contracts may be made by telegram even where it is required they must be in writing, and it has been said it makes no difference if the writing is done with a steel pen an inch long attached to an ordinary penholder or whether the pen be a copper wire one thousand miles long. *Hopley v. Whipple*, 48 N. H. 487; *Moor v. Wood*, 36 N. Y. 307. The telegraph operator was the agent of the judge, and by means of the wire and instruments attached thereto and the

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operator the judge wrote the telegram which was delivered to the clerk. We think it was a written order within the meaning of the statute.

It is however insisted the telegram was a mere notification to the clerk that a written order had been sent to him. But we think it more than this, for the clerk was directed to adjourn the court to a time fixed and made certain by the telegram. It is therefore sufficient.

[But on another point]

Reversed.

WALTON V. MANDEVILLE.

(56 Iowa, 597.)

Statute of frauds — debt of another — oral acceptance of order.

An oral acceptance of an order to pay money is invalid where the acceptor has no funds of the drawer in his hands at the time of acceptance.

ACTION on verbal promise to pay money for another, and on an oral acceptance of an order. The opinion states the case. The plaintiff had judgment below.

John F. Lacey, for appellants.

Crookham & Gleason and Lafferty & Johnson, for appellee.

ADAMS, C. J. Harry Smith & Co. were subcontractors upon a railroad. They became indebted to the plaintiff by reason of the assumption of certain indebtedness due to plaintiff from their laborers. For the purpose of paying such indebtedness they drew an order in the plaintiff's favor upon the defendants, who were contractors upon the railroad and under whom the drawers were subcontractors. The order is in these words :

“*Mandeville, Dowling & Co.* :— Pay to John W. Walton the sum of \$1,024.93, and charge the same to the estimate of Harry Smith & Co.”

The jury found specially in answer to special interrogatories as follows:

“1st. ‘Do you find that the defendants made a parol promise

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to pay the debt of Harry Smith, or Smith & Co.?' Ans. 'Yes; of Harry Smith, to amount of \$1,056.'

"4th. 'Was said promise on condition that there should be any thing due H. Smith & Co. after the expense of the work was paid for?' Ans. 'No.'

"5th. 'Was the order accepted on condition that if there was any surplus after paying the expense of the work and a previous order of \$232 to one Clarke, that surplus should be paid to plaintiff?' Ans. 'No.'"

The evidence shows clearly that there was nothing due from the defendants to H. Smith & Co. The promise relied upon as made by the defendants to pay the debt of H. Smith & Co. was not binding for want of consideration if for no other reason. *Ayres v. C., R. I. & P. R. Co.*, 52 Iowa, 478.

The plaintiff however insists that the defendants are bound by the acceptance of the order, though the same is verbal and without consideration moving to them. The defendants deny that there was any acceptance. The jury did not specially find that there was. They find a mere promise to pay the debt of Harry Smith; but that was for an amount somewhat greater than the order; and the verdict, we think, must have been based upon such promise, because the order was not large enough to justify the verdict rendered.

Again the promise, whatever it was, appears to have been made by an agent of the defendants, and it is insisted by the defendants that the promise, if made, would not bind them. They go further and insist that even one of the partners could not have bound the firm by such a promise, in the absence of funds of Harry Smith & Co. in their hands.

These questions have been discussed by appellants' counsel but the case is now before us upon rehearing, and in granting the rehearing we called for arguments merely upon the question of the validity of the verbal acceptance of an order where there are no funds of the drawer in the hands of the acceptor. We could not, we think, properly go into the consideration of the other questions without calling for an argument from the counsel for the appellee, and as we have reached a conclusion adverse to him upon the question upon which arguments were called for, it is unnecessary to consider any other question.

In the opinion originally filed it was held that the verbal acceptance of an order is valid notwithstanding there may be no funds of

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the drawer in the hands of the acceptor. Upon the rehearing several authorities have been cited to which our attention was not called, and some which had been cited we have been able to give a more careful examination than we did before, and we have to say that we have reached a different conclusion.

The validity of the verbal acceptance of an order has been sustained in several cases. Quite a number were cited in our original opinion, and it must be said in none of them did it appear that a distinction had been recognized between cases where there have been funds of the drawer in the hands of the acceptor and where there have not. The general way in which the rule was stated led us to believe that the distinction had not been deemed material. In Daniel on Negotiable Instruments, § 566, the opinion is expressed that the distinction is not material. This opinion is based in part upon the unqualified language used in the decisions, and in part upon what are supposed to be the demands of commercial paper.

On the other hand it is said in Browne on Frauds, 174: "There seems to be no sound reason why a verbal acceptance or promise to accept for the mere accommodation of the drawer, and without value received, should not be treated as within the statute." In Robinson's Practice, 2 vol. 152, it is said: "The parol acceptance being no more than a parol promise it seems to the author that whether or not the acceptor can be charged on such promise may depend upon whether the promise is to pay a debt of his own or to answer for the debt of another; for in the latter case no action can be lawfully brought unless the promise or memorandum or some note thereof be in writing and signed by the party to be charged thereby or by his agent." In *Quin v. Hanford*, 1 Hill, 84, the defendant was treasurer of a corporation. An order was drawn upon him for a debt of the corporation which he agreed to pay. It was held that in the absence of funds of the corporation in his hands he was not liable. That a verbal acceptance in the absence of funds of the drawer in the hands of the acceptor is not valid was held in *Pike v. Irwin*, 1 Sandf. 14, and *Manly v. Goegan*, 105 Mass. 445. That a verbal promise to accept in the absence of such funds is not valid was held in *Plummer v. Lyman*, 49 Me. 229, and *Wakefield v. Greenwood*, 29 Cal. 600. We have become satisfied that the doctrine of these cases is correct.

As opposed to them we find but little except the statement of one or two text writers, based as it seems to us almost wholly if not en-

tirely upon mere inference or *dicta* or adjudications not precisely in point.

The plaintiff's argument is that a verbal acceptance is equivalent to a written acceptance; that the validity of a written acceptance does not depend upon the existence of funds of the drawer in the hands of the acceptor, therefore the validity of a verbal acceptance does not.

But we cannot accept this reasoning as sound. It is true that no consideration is necessary to bind an acceptor who has become such by written acceptance. But then he becomes a party to the paper. His liability, we apprehend, rests strictly upon this ground. An acceptor by verbal acceptance does not become a party to the paper; certainly not in any such sense as he would by written acceptance.

A verbal promise to pay the debt of another can be enforced where the promisor by the payment would pay his own debt as well as of the person in whose behalf the promise was made. And such is precisely the case where there is a verbal acceptance of an order by a person who has funds of the drawer. Indeed it is not necessary that the request should be made in writing. If A., having funds belonging to B. promises C., at B.'s verbal request to pay C. from such funds a debt due him from B., A. is holden. This doctrine is elementary. The validity of a verbal acceptance of an order must, we think, rest upon the same ground. We see no other.

The view which we have expressed appears to us to be the only safe view, and the only one which can be sustained upon principle.

The defendants have been adjudged to pay another person's debt, in the absence of any consideration, upon an alleged verbal promise of their agent, such promise being expressly denied by the agent, and proven by no evidence except the testimony of the plaintiff, and that of a very weak and unsatisfactory character.

We are unwilling to sanction a rule which shall make a recovery possible in such a case.

Finding no evidence to justify a recovery under what we deem the correct rule, the judgment must be

Reversed.

Bon v. Railway Passenger Assurance Company.

BON V. RAILWAY PASSENGER ASSURANCE COMPANY.

(55 Iowa, 604.)

Insurance — accidental — contributory negligence

The plaintiff was insured against accidents while travelling on conveyances of any common carrier, provided he complied with the rules and regulations of the carrier and exercised due diligence for self-protection. While riding on a railway car, on approaching a station he stood on the steps, in violation of the carrier's rule, known to him, and was thrown therefrom and injured. *Held*, that he could not recover on the policy.*

ACTION on an accident insurance. The opinion states the case. The plaintiff had judgment below.

Stiles & Lathrop, for appellant.

Wm. McNett and *H. B. Hendershott*, for appellee.

ROTHBOCK, J. The plaintiff purchased an accident insurance ticket of an agent of the defendant to go from Creston to Afton, Iowa, a distance of ten miles. Before the station at Afton was reached, and while the train was yet in motion, the plaintiff left his seat in the car in which he was riding, went upon the platform and took a position on the step, from which he was precipitated to the ground before reaching the passenger platform, and one of his feet was so injured, by being crushed by a wheel of one of the cars composing the train, as to require amputation. The action was brought to recover for loss of time at \$15 per week for twenty-six weeks, according to the terms of the insurance ticket. The accident policy or ticket contained the following clause: "Provided always that this insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured while actually riding on a public conveyance provided by common carriers for the transportation of passengers in the United States or Dominion of Canada, and in compliance with all rules and regulations of such carriers and not neglecting to use due diligence for self-protection." * * * It must be conceded that it was incumbent on the plaintiff, in order to recover, to prove not only that he was accidentally injured while on his journey, but that

* See note, 87 Am. Rep. 710; *Jewell v. Ch., etc., Ry. Co.*, ante, 63.

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he was at the time of the accident complying with the rules and regulations of the railroad company, and not neglecting to use due diligence for self-protection. The Circuit Court instructed the jury to this effect, and no question is made as to the correctness of these instructions.

When the plaintiff rested his case the defendant moved the court to instruct the jury to return a verdict for the defendant upon the plaintiff's evidence. The motion was overruled and this ruling is assigned as error. To determine whether this motion should have been sustained, it will be necessary to give the substance of the evidence as introduced by the plaintiff up to the time the motion was made, and finally ruled upon. It appears from the evidence that as the train approached the station the whistle sounded and a brakeman called the name of the station. The train began to slow down and the plaintiff, seeing other passengers get up and walk out, arose from his seat, about five seats back in the car, and followed them out of the door upon the platform to get off. The steps of that car being occupied by a passenger, plaintiff stepped across upon the platform of the forward car, and stood upon the steps with his hands holding the railing preparatory to stepping off, and was followed upon that platform by another passenger. At this time the train had slowed down, as plaintiff says, to about two and a half miles per hour, and as other of his witnesses say to from two to five miles per hour, when without warning the train gave a sudden start forward, whereupon the man in the rear of the plaintiff lost his balance, and falling against the plaintiff precipitated him from the steps, and in his fall his foot got under the wheel and was crushed. He fell at a point about twenty feet before reaching the passenger platform.

The foregoing is the statement of the evidence for the plaintiff as made by his counsel in argument, and in nearly the same language. That it is as favorable for the plaintiff as is justified by the record must be conceded. To this should be added the further fact that on the doors of the passenger coaches the following rule was inscribed upon a metallic plate: "Passengers are not allowed to stand on the platform." And the plaintiff himself as a witness on the stand testified that he was aware of this rule of the railroad company.

Conceding the foregoing statement of facts to be true, was there such a failure of proof from the plaintiff's own showing as to re-

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quire the court to direct the jury to return a verdict for the defendant? It will be observed that the rules of the company forbid passengers from standing on the platform. In its literal sense this would require them not to stand there whether the train was at rest or in motion, and it seems to us to be a reasonable requirement at all times. The platform of a car is a narrow passage for ingress and egress, and if crowded even while standing at a station it is an annoyance and inconvenience to those desiring to enter or leave the car. But in this case the train was in motion when the plaintiff went upon the platform. It is true the rule must receive a reasonable construction, and even while the train is in motion persons may rightfully pass from one car to another for proper purposes, such as going to and from a dining, smoking, or sleeping car, and the like. They are invited to do so by the agents and servants of the company, and by the manner in which trains are made up. But in so doing there would be no violation of the rule. The passenger in such cases does not *stand* upon the platform. The plaintiff's case is wholly different. He went upon the platform while the train was in motion, and some time before it arrived at the regular stopping place. He stood with his feet upon the steps, which must be regarded as part of the platform, and holding the railing by his hands he awaited either the slowing up of the train or its arrival at the passenger platform, that he might alight. While in this position he received his injury. We think by his own statement that the accident happened while he was in plain violation of the rule under consideration, and because of such violation. It is urged that it is usual for travellers to go upon the platform of cars and get off before the train comes to a dead stop. Let this be admitted. Passengers also take fearful risks in boarding trains in motion, but we have yet to find any adjudged case where a passenger was allowed to recover damages by reason of personal injuries received in voluntarily and without cause alighting from or boarding an ordinary railroad train propelled by steam, and while in motion, unless it may be by the direction of the conductor or some one in authority. In such case the passenger must be held to take the risk upon himself, and make the peril his own. Under our statute he is guilty of a misdemeanor. Chapter 148, Laws 16th General Assembly. In *Hickey v. R. R. Co.*, 14 Allen, 429, it is said: "If the injury happen while the party is occupying a place provided for the accommodation of passengers, nothing further is

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ordinarily necessary to show due care. But when the plaintiff's own evidence shows that he had left the place assigned for passengers, and was occupying an exposed position, he must necessarily fail unless he can also make it appear upon some ground of necessity or propriety that his being in that position was consistent with the exercise of proper care and caution on his part." Again it is said "Ordinarily no accident occurs to those who rush out of the train or into the cars at stations before the train fairly comes to a stop or after it is in motion again, but it cannot now be questioned that those who do so take upon themselves all the risks which attend such a practice." Citing *Gerrett v. R. R. Co.*, 16 Gray, and *Lucas v. R. R. Co.*, 6 id. 64; and *Sweeney v. R. R. Co.*, 10 Allen, 368. See also 2 Redfield on Railways, 260-267 and cases cited.

It is said however that the plaintiff did not alight from the train while in motion, but that by the sudden starting up of the train he was jostled off by the passenger who stood behind him upon the platform. There is no claim that the engineer of the train knew that the plaintiff was in a perilous position, and after such knowledge was guilty of negligence in suddenly increasing the speed of the train. The plaintiff, whether he intended to alight from the train or not, by standing on the steps of the platform without any excuse or reasonable cause therefor, did an act which he knew was in plain violation of a rule of the company, and thereby forfeited any right of recovery on the contract of insurance as expressed in the very terms of the policy.

It is true as stated by counsel for plaintiff, that this is an unimportant case, the amount of recovery being only \$135. But we cannot adopt a rule which would authorize passengers by railway to crowd the platforms of moving cars and endanger each other's lives by hanging by the railings and upon the lower steps in a rush to alight from trains approaching stations, and in boarding outgoing trains at the risk of life and limb. As is said in *Damout v. N. O. & Carrollton Railway*, 9 La. Ann. 441, if a passenger "is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, and for this, his own gross imprudence, he can blame no one but himself." So in this case the plaintiff took the risk of standing upon the steps of the platform, and he should not be allowed compensation from any one for so plain a violation of a rule of the company, of which he was fully aware.

The jury should have been directed to return a verdict for the defendant.

Judgment reversed.

Hecht v. Dettman.

HECHT V. DETTMAN.

(56 Iowa, 679.)

Real property—crops when not.

As between a purchaser of land on a foreclosure sale and the mortgagor's tenant, crops planted by the latter, and mature when the sheriff's deed is executed, although not severed, do not pass by the sale. (*See note, p. 134.*)

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

F. C. James and Wolf & Landt, for appellant.

Piatt & Carr, for appellee.

BECK, J. Two cases are presented together in this appeal. They involve the same facts and rules of law, and are between the same parties; they are therefore properly submitted together upon the same abstract. There is no dispute as to the facts, which are as follows: The property replevied is barley, cut and in shocks, and oats being partly threshed and partly in bundles or sheaves, all upon the premises where it was grown. The defendant had rented the land of one Ehrke, who had previously executed two mortgages thereon, one the senior incumbrance, to the New England Loan Company and the other to the plaintiff Hecht. After defendant had rented the land plaintiff foreclosed his mortgage, and on the 7th day of July, 1879, the time for redemption from the sale as prescribed by the statute, having expired, a deed was executed by the sheriff. The other mortgage was foreclosed and the land was sold to one not a party to this transaction, and the time of redemption under the statute expired August 15, 1879, when a sheriff's deed was made. The foreclosure and sale under this mortgage cut off all claim or title held by plaintiff as well as by the mortgagor. Defendant continued in possession of the land up to the trial in the court below. At the time plaintiff received his deed the grain was not cut, but it was mature and ready for harvesting before that day. Rainy weather had prevented the defendant from cutting the grain before the plaintiff's deed was executed. The court instructed the jury that the title of the grain passed to plaintiff by the sheriff's

deed and directed a verdict for plaintiff. We are required to determine whether this view of the law be correct.

II. The sheriff's deed executed upon the foreclosure sale vested plaintiff with the title of the land, and the right to all growing crops followed the title thus acquired. *Downard v. Groff*, 40 Iowa, 597.

This rule, we think, is not applicable to grain which has matured and is ready for the harvest. It then possesses the character of personal chattels, and is not to be regarded as a part of the realty. See 1 Schoul. Per. Prop. 125, 126 ; Bingh. Sales of Real Prop. 180, 181.

The conclusion is well supported upon the following reasons : The grain being mature, the course of vegetation has ceased and the soil is no longer necessary for its existence. The connection between the grain and the ground has changed. The grain no longer demands nurture from the soil ; the ground now performs no other office than affording a resting place for the grain—it has the same relations to the grain that the warehouse has to the threshed grain or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting, it is true, appears to sever the straw from the land. But it is demanded by the condition of the grain. It is no longer growing ; it is no longer living blades which require the nourishment of the soil for its existence and the development. It is changed in its nature from growing blades of barley or oats to grain mature and ready for the reaper. Now the mature grain is not regarded by the law like the growing blades, as a part of the realty but as grain in a condition of separation from the soil.

Suppose the defendant had cut a part of the seventy-two acres of grain in controversy ; the grain so cut, it will not be denied, would not have passed to plaintiff. There is no valid reason why the act of cutting should change the property in the grain. The work required time and therefore plaintiff loses a part of his property. All of the grain is in the same condition, all ready for the reaper. The part cut is his property, while the part uncut belongs to the land owner. We think the ownership of the grain should be determined by its condition, not by the act of cutting, which cannot be done as soon as it is demanded by its condition. We conclude that for the reason the grain was mature and was uncut be-

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cause defendant has been unable to do the work, it cannot be regarded as part of the realty which passed with the deed to plaintiff.

[Unimportant matters omitted.]

The judgment of the Circuit Court must be reversed.

ON REHEARING.

ROTHROCK, J. A petition for rehearing was granted in this case not because any member of the court doubted the correctness of the principle involved in the opinion, but because the question as to when a crop ceases to be a part of the realty was not discussed in the original arguments of counsel.

The arguments on the question which have been submitted on the rehearing are able and exhaustive. Without reviewing the authorities cited in argument we deem it sufficient to say that we still believe the opinion to be correct in principle, and it is well supported by authority. It is not to be denied there are adjudged cases, in courts entitled to the greatest respect, which hold that upon a sale of real estate all crops standing upon the ground and not severed from the soil, whether ripe or unripe, pass with the land. These are cases however between vendor and vendee, where the interest in the land and crop is united. There seems to be a distinction in favor of a tenant. In Washb. on Real Prop. 4 and 5, it is said: "Growing crops planted by the owner of the soil constitute a part of the realty, but if planted by a tenant who holds under the owner of the soil, and the same are fit for harvesting, or by one whose tenancy is for an uncertain period of time, annual crops are regarded as personal property, liable to become part of the realty if the tenant voluntarily abandons, or forfeits possession of the premises. Growing crops standing upon the soil when the latter is conveyed pass as part of the realty if planted by the grantor."

The rule we adopt as applicable to the facts of this case is manifestly just. Dettman was warranted in the belief, that according to the seasons, and the course of nature, his grain would be harvested while he yet had the right to harvest it. So far as the ripening of the grain was involved it met his just expectations. But by reason of unfavorable weather he was unable to sever it from the ground before the title passed to Hecht. Having sown in peace, and in a just belief that he could rightfully reap, we think he should have been permitted to do so. The former opinion is adhered to.

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NOTE BY THE REPORTER.—The general doctrine is that the lessee of the mortgagor, under a lease executed subsequent to the mortgage, is not entitled as against the mortgagee, to crops growing on the mortgaged premises at the time of foreclosure and sale. *Lane v. King*, 8 Wend. 584. This however was not the case of a mature crop, and it also appeared that the tenant knew of the mortgage, and had been warned by the mortgagor not to sow. The same doctrine was held as to a crop not mature, in *Hinsell v. Schenck*, 4 Zab. 89; *Shepard v. Philbrick*, 2 Denio, 174; *Jones v. Thomas*, 8 Blackf. 428.

The citations from Schouler on Personal Property and Bingham on Sale of Real Property, in the principal case, are founded on cases simply holding that an oral contract for sale of a growing periodical crop, planted by the tenant, is not a contract for sale of any interest in land. The precise distinction of the principal case does not seem to have been drawn before, and there is nothing in the adjudged cases, so far as we can discover, lending any countenance to it. Severance of the crop, pending foreclosure, although it remained on the land, might vest title in the tenant. *Johnson v. Camp*, 51 Ill. 230. In *McLean v. Bovee*, 24 Wis. 295, it is held that one who recovers land in ejectment is entitled to the crop of wheat thereon, partly cut and partly uncut, which was planted after the action was commenced. Citing *Doe v. Wetherwicke*, 8 Bing. 21; *Hodgson v. Gascoigne*, 5 B. & Ald 88; *Lane v. King*, 8 Wend. 584. Mr. Jones in his work on Mortgages, the most recent authority, makes no distinction between growing crops and mature crops, but says the "mortgagor is subject to ejectment without notice whenever the mortgagee has the right to enter, and is not entitled to the growing crops. His tenant has no greater rights." Sec. 780. In *Rankin v. Kinsey*, 7 Bradwell, 215, it was held that "crops growing on mortgaged land are covered by the mortgage, whether planted before or after its execution, until they are severed"; and "if the land be sold for condition broken before severance the purchaser will be entitled to the growing crops, not only as against the mortgagor, but against all persons claiming in any manner through or under him subsequent to the recording of the mortgage." But in this case the crop was not mature. To the same effect is *Gillett v. Balcom*, 6 Barb. 370. And Washburn seems to recognize severance as the test, for he says (1 Real Prop. m. p. 106): "If a mortgagee forecloses his mortgage, whatever crops are then growing upon the mortgaged premises, if planted after the mortgage is made, become the mortgagee's, whether planted by the mortgagor or by his tenant, free from any claim upon them by such tenant." (Citing the cases we have given above.) "But a foreclosure after the crops are severed does not carry an interest in them to the mortgagee or purchaser."

See *Hendrixson v. Cardwell* (9 Baxt. 389), 40 Am. Rep. 93, and note, 96.

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(56 Iowa, 608.)

Offices and officer — officer de facto — claim to compensation.

A public officer *de facto* may not recover compensation from the public for his services in the office.*

ACTION for services. The opinion states the case. The plaintiff had judgment.

Moore & Hammond, for appellant.

William McNett and H. B. Hendershot, for appellee.

* See *McVeany v. Mayor* (80 N. Y. 185), 36 Am. Rep. 600.

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BECK, J. I. The petition alleges that plaintiff between the 19th day of September, 1878, and the 7th day of April, 1879, was acting sheriff of Wapello county, and in the discharge of his duty as such officer, he rendered certain services and expended certain sums of money, for which, together with an amount due him as salary, he seeks to recover in this action. The answer denies the allegations of the petition and avers the facts connected with plaintiff's claim to be substantially as set out in the finding of the court, which will hereafter appear. It further alleges that plaintiff performed the services and made the expenditures sued upon, as deputy of the sheriff of the county, and that whatever claim he has therefor should be made against and adjusted with the sheriff for the services and outlay in question. Upon the issues thus presented the cause was tried to the court.

[Point of practice omitted.]

III. The findings of the court are as follows :

“1st. I find that at the general election, held in 1877, D. W. Stewart was elected to the office of sheriff of Wapello county, Iowa ; that at the proper time he qualified as such officer and entered upon the duties of said office ; that he appointed as his deputies the plaintiff, W. D. McCue, and Q. A. Wood, who each qualified as such deputies and each entered upon the discharge of the duties of deputy sheriff. The duties of said Wood were confined mostly to the care of the jail, and the prisoners confined therein ; and the duties of the plaintiff were confined mostly to the service of processes, etc.

“2d. That at the August term, in 1878, of the District Court of said county, the grand jury presented an indictment against the sheriff, D. W. Stewart, charging him with the crime of extortion, and the court, on the 19th day of September, 1878, suspended him from office under section 756 of the Code.

“3d. That at the time the court suspended Stewart from office it appointed the plaintiff to the same office, for the balance of the term, under section 753 of the Code.

“4th. That said plaintiff at once entered upon the duties of the office, took possession of the books and papers pertaining to the same ; took control of the jail and prisoners therein, the said Wood continuing to act as jailor, but under the direction of the plaintiff.

“5th. That D. W. Stewart, after his suspension from office by the court, did not perform or attempt to perform, any of the duties

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pertaining to said office from the 19th day of September, 1878, to the 1st day of March, 1879.

“6th. That on the 11th day of October, 1878, the board of supervisors of Wapello county appointed Thomas Bedwell sheriff, in the place of Stewart, suspended. Said Bedwell qualified and performed some of the duties of the office.

“7th. That the plaintiff, after his appointment by the court, to the time of the appointment of Bedwell, performed, either by himself, or others acting under him, including Wood, the jailor, all of the duties of the office ; that said Wood recognized the plaintiff as sheriff and took his instructions from him.

“8th. That after Bedwell was appointed by the board the plaintiff denied his authority to act as sheriff, and retained possession of the books and papers of the office and the control of the jail, and continued to perform the duties of sheriff, under a claim of right ; that Bedwell had at no time charge of or control over the said books and papers, or the jail, or the prisoners confined therein.

“9th. That said Bedwell or no other person commenced any action against plaintiff, to determine his right to the office. But said Bedwell did petition the Circuit and District Courts when in session, to recognize him as the sheriff instead of McCue ; that the Circuit Court did so recognize him as sheriff during most of the October term, 1878, of said court. But the District Court at the January term, 1879, refused to recognize Bedwell as sheriff, but recognized the plaintiff, who seemed to be in the possession of the office under a claim of right, and had the custody of the books and papers belonging to the office, and the control of the jail and the prisoners confined therein.

“10th. That the plaintiff performed most of the duties of the office during the time aforesaid, from the 19th day of September, 1878, to the 1st day of March, 1879, publicly, openly, and under a claim of right to the office ; that he performed many of said duties at the request of public officers and the court ; that in whatever he did he acted in good faith, and claimed the right to the office, and to perform its duties, under the advice of able attorneys.

“11th. That the defendant had knowledge of his claim, and the board of supervisors audited and allowed bills presented by him for such services to the amount of \$1,000 or more, about \$400 of which was for dieting prisoners, sent to prison by the city authorities.

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“12th. That on the 1st day of March, 1879, the said District Court vacated the order of suspension, holding that the record did not show authority to make it, and restored Stewart to the office of sheriff.

“13th. That during the time the order of suspension was in force Stewart took no appeal from it, and that he performed none of the services, directly or indirectly, for which the plaintiff claims compensation.

“14th. That Stewart, after the order of suspension, was revoked, presented a claim to the board of supervisors for dieting prisoners, which embraced the same charges presented by plaintiff for such services ; that the board allowed Stewart's claim, but at the same time had knowledge that plaintiff claimed pay for such services.

“15th. That Stewart had no legal claim against the county for said services, and the payment by the board to him is no bar to plaintiff's claim.

“16th. That the plaintiff expended in dieting prisoners, and expenses connected with the jail, and incurred in the discharge of the duties of sheriff, from \$1,000 to \$1,200.

“17th. That the plaintiff, during the time aforesaid, was sheriff *de facto* ; that he performed said services under a claim of right, in good faith, and was not a mere intruder in said office.

“18th. That the claims sued upon were duly presented to the board of supervisors for allowance, and the board refused to allow them, before this suit was brought.”

It will be observed that the fifteenth, sixteenth, and seventeenth findings present conclusions of law. The court also found as a conclusion of law “that the plaintiff is entitled to compensation for all services actually rendered to the public, and for such services he should receive the fees provided by law and paid to the sheriff for like services.” Other conclusions of law found by the court relate to the amounts found due the plaintiff upon the several items of his account ; they need not be presented here.

The evidence shows without conflict that after the order for the removal of Stewart no change was made in the business of the office, except that Stewart performed no duties connected with the office though he continued about the sheriff's office. The plaintiff continued to use the horses and vehicles owned by Stewart and used by him and his deputies in official services. Some provender bought by Stewart and on hand at the time of his removal was used by

plaintiff. No compensation was paid Stewart for the use of the horses or for the provender. The testimony shows without conflict that plaintiff apprehended trouble from Bedwell alone, whose claim to the office he successfully resisted, and it may be found that in this he was assisted by Stewart.

IV. The order suspending Stewart from the office of sheriff was at a subsequent term revoked on the ground that it was made "without authority." The revocation stands as an adjudication binding upon all parties concerned. If the order was made "without proper jurisdiction or authority," and it is so declared in the judgment setting it aside, it is void. If void Stewart never ceased to be sheriff. He was the sheriff *de jure* while plaintiff as sheriff *de facto* was discharging the duties of the office. This view seems to have been entertained by the court below, and is conceded by counsel on both sides of the case. It is surely correct.

The District Court found that plaintiff was, during the time the services in question were rendered, sheriff *de facto*, acting in good faith under a claim of right to the office, and is therefore entitled to recover the compensation provided by law for such services. Here is the decisive error of the learned judge of the District Court. The doctrines of the law applicable to officers *de facto* do not extend so far as to confer upon them all the rights and protection to which an officer *de jure* is entitled. The doctrines operate only for the protection of the public. They cannot be invoked to give him the emoluments of the office as against the officer *de jure*. Upon this very point we used the following language in *McCue v. Circuit Court of Wapello County*, 51 Iowa, 60, 67: "It will be remembered that one exercising the power of an officer without lawful authority is regarded as an officer *de facto*, not for his own protection or advantage, but for the protection of the public and those who are doing business with him. When his right to the possession of the office is to be determined he cannot be declared an officer *de jure* on the ground that he has been an officer *de facto*." We may add that the right to the possession of an office carries with it the right to emoluments pertaining to the place. When an officer seeks to recover these emoluments he must show his right to the possession of the office. The rule is based upon the ground that the officer *de jure*, who has been ousted from his place by an intruder, has a property interest in the emoluments of the office, of which he cannot be deprived by one having no title thereto. This property right

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demands protection, and the officer *de facto* cannot recover emoluments to which the officer *de jure* is entitled. No such right intervenes when the acts of a *de facto* officer done in the discharge of the duties of the office are considered. The rights and protection of the public and all persons transacting business with the officer demand that such right be held valid. But when the question involving the emoluments of the office are considered, the rights of the officer *de jure* forbid that the intruder be regarded as the officer.

The case of a *de facto* officer is not unlike that of one in possession of land without right or title. He may in many things lawfully act as the owner of the realty, but he must account to the person holding the title for the rents and profits. These views we think are supported by the following cases: *Glascock v. Lyons*, 20 Ired. 1; *Comstock v. Grand Rapids*, 40 Mich. 397; *Riddle v. Bedford*, 7 S. & R. 386; *People v. Dorsey*, 28 Cal. 21; *People v. Oulton*, id. 44; *Carryll v. Siebenthaler*, 37 id. 193; *People v. Webber*, 86 Ill. 283; *Mayfield v. Moore*, 53 id. 428; s. c., 5 Am. Rep. 52; *People v. Miller*, 24 Mich. 458; s. c., 9 Am. Rep. 131.

[Omitting statutory considerations.]

VI. The court below found that plaintiff held the office under a claim of right and in good faith, and that he was not a mere intruder. The good faith and claim of right of an officer *de facto* cannot affect the right of the officer *de jure* to emoluments of the office, nor will these things deprive the incumbent of the character of an intruder. Good faith and claim of right are usually, if not always, exercised by *de facto* officers; if they be absent he is criminally liable. Code, §§ 3962-3. The officer *de facto*, when the rights of the *de jure* officer are considered, must be regarded as an intruder even though he claim the office in good faith. This conclusion is supported by the authorities just cited.

We reach the very satisfactory conclusion that plaintiff is not entitled as an officer *de facto*, to recover the emoluments of the office; that Stewart, the officer *de jure*, is entitled to all of them, and that defendant is not liable in this action.

VII. The fact that plaintiff actually performed the services, and made the outlays for which he sues, seems to have had much influence in the determination of the cause by the court below. Doubtless he is entitled to recover from the officer *de jure*, Stewart, the compensation to which he is entitled by contract or by law. It will be remembered that he was the sheriff's deputy when the void

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order for the removal of that officer was made ; Stewart's right to the office was not affected by that order ; the appointment of plaintiff was not revoked, and it continued valid during the time he acted as sheriff. The law regards Stewart as the sheriff during all this time, and plaintiff as his deputy. Plaintiff's emoluments must be determined by the contract existing between him and Stewart, either express or implied, or by the statute regulating the compensation of deputy sheriffs, if there be any applicable to this case.

The judgment of the District Court will be reversed and the cause will be remanded for judgment in accord with this opinion.

Reversed.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

MANN V. WHITE RIVER LOG AND BOOMING COMPANY.

(46 Mich. 88.)

Carrier — common.

A log-driving and booming company is not a common carrier.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

F. W. Cook, for plaintiff in error.

Frank Bracelin, and *Norris & Uhl*, for defendant in error.

CAMPBELL, J. Plaintiff sued defendant for not delivering part of a quantity of logs which the company had in charge to deliver at White lake, after running them down from their place of reception on White river. As the case was passed upon by the jury they necessarily found that there had been no fault or negligence in defendant, and the only question before us is whether defendant was a common carrier, and liable at all events, except for the risks of a public enemy or inevitable casualty.

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The duty undertaken by the defendant was in accordance with its statutory power to drive, run, raft and boom logs in White river for any person having logs to float down the stream, and the case shows that the work of all kinds was done at regular rates, and for all alike.

The dispute therefore is narrowed down to the single question whether the handling of logs, as managed by the log-driving and booming companies, is properly to be treated as common carriage.

It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges. Comp. L., § 2788. The statute moreover gives a special remedy to enforce the lien. It also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for.

These rights resemble in important respects the rights of common carriers. But the statute contains no declaration that the companies shall be so treated, and the whole matter is left to be determined by legal analogies.

When we look at the business done, it will be found to resemble in some respects the business of carriage, and in some respects it is like different business, while in most things it is peculiar and subject to its own conditions. It has one peculiarity in which it differs entirely from common carriage, which was held by this court in *Fitch v. Newberry*, 1 Doug. 1, to create no rights against property not voluntarily intrusted to the carrier. One important part of the compensated business of these companies includes the temporary control of logs interfering with the free running of the body of logs in the stream. Comp. L., § 2793.

The peculiarity which is most apparent is that there is no carriage whatever either in vehicles or by application of motive power, unless in some emergency. The logs of various owners are usually, as they were in the present case, set floating promiscuously, and only sorted and separated when the run is as to some portion at least substantially completed. The logs are floated down the streams by the force of the current, sometimes aided by dams and flooding, and if it were not for the risk of jams, no interference to any great extent would be needed. The chief work of the companies when running and driving logs is to see that they are kept in the way of floating down stream, and not allowed to accumulate in jams and

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obstruct the floatage. And it is to prevent this that the compulsory powers are exercised.

It is manifest that this kind of service differs very much from the possession and transfer of articles which are always in custody and which could not be moved except by the vehicles of the carrier. Among the somewhat fanciful reasons given for the peculiar duties and responsibilities of common carriers, we cannot always determine how far any of them actually operated in shaping the legal rules. But it is dangerous to run after supposed analogies and extend peculiar rules to new cases substantially different from the old. Courts have no doubt settled the law of common carriers as applying to all classes of carriage, however free from most of the special risks and temptations which were relied on to uphold the ancient doctrines. But when it is sought to extend the rules outside of the carrying business altogether, we should not do this unless on very plain reasons of fitness.

Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are at least quite as analogous as carriage. Drovers — or as the common law calls them, agisters — perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers. Ang. on Carr., §§ 24, 52; Story on Bailm., § 443. The entire absence of any motive power, and the function of guiding and regulating things which move themselves or are moved by some independent force, make it impossible to treat these classes of business as carriage in fact, and it is difficult to see how, if involving no carriage, there is any propriety in calling them carriage.

There is always hardship and often wrong in holding persons liable for what they have done their best to avoid. While we are bound to respect established rules, we cannot wisely extend them beyond their reasonable application. We think the court below decided correctly that the extreme liabilities of common carriers did not apply to defendants.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

De Moss v. Robinson.

DE MOSS V. ROBINSON.

(46 Mich. 68.)

Contract — oral promise to devise.

An oral promise to devise is revocable, and as to real estate is void, and the consideration paid may be recovered, if the devise is not made as agreed.*

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Chandler Richards, for plaintiff in error.

E. R. Annable, for defendant in error.

MARSTON, C. J. Harriett De Moss, having received \$900, offered to give it to the plaintiff in error, who was her father-in-law, "on condition that he should make his will giving his property to his two children (one of them the husband of Harriett) equally in case her husband survived her, and in case she survived her husband then that plaintiff in error should will his property equally to the remaining son and herself." This proposition seemed to have been satisfactory, the money was paid over and a will afterward made and executed, which the testator offered to read to Harriett, but she expressing confidence in the testator it was not read. Harriett De Moss dying intestate Robinson was appointed administrator and brings this action to recover back the money. The will gave certain of testator's property to his wife and also bequeathed to her his real estate for and during the term of her natural life, and subject to this life estate the real estate was bequeathed in accordance with the oral agreement with Harriett De Moss.

The administrator recovered in the court below, and we find no error in the record. The payment was made without consideration. The oral agreement related, in part at least, to real estate, and no valid agreement was made binding upon the plaintiff in error. The will he made was not in accordance with the oral agreement, and even if it had been there was nothing to prevent his revoking the same, or selling or incumbering the same during his life-time Under

*See *Taylor v. Mitchell* (87 Penn. St 518), 30 Am. Rep. 883. In *Howard v. Brower*, 37 Ohio St. 402, it is held that an alternative oral promise to compensate a party by will either in land or money is void.

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such circumstances the administrator was entitled to recover, and the judgment must be affirmed with costs.

Judgment accordingly.

GRAVES and CAMPBELL, JJ., concurred. COOLEY, J., dissenting. said: The question is whether this will is a sufficient consideration for the money defendant received. This, it seems to me, must depend upon whether the will complies with the understanding under which it was made. There is nothing in the nature of the act to be done that precludes a party from bargaining for a benefit to be received by will, and promises to reward services in that way have been frequently considered and held valid. The cases of *Fenton v. Emblers*, Burr. 1278; *Jacobson v. Le Grange*, 3 Johns. 199; *Patterson v. Patterson*, 13 id. 379; *Mertin v. Wright*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill, 576; *Bayliss v. Pricter's Estate*, 24 Wis. 651; *Jilson v. Gilbert*, 26 id. 637; s. c., 7 Am. Rep. 100; *Little v. Dawson*, 4 Dall. 111; *Snyder v. Castor*, 4 Yeates, 353, and *Sword v. Keith*, 31 Mich. 247, either affirm or recognize this principle, and in *Faxton v. Faxton*, 28 id. 159, it is said that such a promise does not differ in its essentials from any other. Where it rests in parol its performance could not be enforced in equity if lands were to be devised (*Harder v. Harder*, 2 Sandf. Ch. 17; *Gould v. Mansfield*, 103 Mass. 408), unless under such circumstances as would justify the enforcement of a parol contract for the conveyance of lands (*McClure v. McClure*, 1 Penn. St. 374); but if the contract is not within the statute of frauds, equity may compel those on whom the legal title has devolved to convey lands in fulfillment of the promise to give them by will. *Randall v. Willis*, 5 Ves. 262; *Fortesque v. Hennah*, 19 id. 67; *Brinker v. Brinker*, 7 Penn. St. 53; *Logan v. McGinnis*, 12 id. 32; *Mundorff v. Kilbourn*, 4 Md. 459.

In this case the contract was not in writing, and it contemplated that lands should be devised. It was not of its own force therefore a valid contract. But it was fully performed on the part of the intestate, and if the will which was made by defendant was in accordance with the understanding, it was fully performed by him also. The intestate continued to reside with defendant up to the time of her death, and had defendant deceased first, she would have had the benefit of the provisions made on her behalf by the will. This performance on both sides relieves the case of any question that might otherwise arise under the statute of frauds.

CRITTENDEN V. FISKE.

(46 Mich. 70.)

Guaranty — continuing — acceptance.

A guaranty to pay for goods to be sold "from time to time," not exceeding a specified sum, continues until the amount unpaid reaches that limit, although the aggregate of purchases may exceed it.

When a guaranty, absolute in form, waives notice of times or amounts of sales, the guarantor is not entitled to notice of acceptance.*

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

S. E. Engle, for plaintiff in error.

Levi T. Griffin (*Griffin, Dickinson, Thurber & Hosmer*), for defendant in error.

COOLEY, J. In this case the defendants in error, plaintiffs in the court below, have recovered on a guaranty by the plaintiff in error of purchases of merchandise by one Mrs. Coe. Two questions are made in the case — First, whether the guaranty was a continuous one; and second, whether the guarantor was entitled to notice of acceptance.

The plaintiffs below were merchants doing business in Chicago. Mrs. Coe, who had dealt with them before, was not in good credit, and they declined to sell to her on time without security. She proposed Crittenden, who resided in this State, as guarantor, and they thereupon wrote and transmitted to him a paper in the following words :

"CHICAGO, May 5, 1877.

"In consideration that D. B. Fiske & Co. of Chicago, Illinois, will and do sell to Mrs. O. S. Coe, Ypsilanti, Michigan, upon credit, bills of goods from time to time as she may order, I, the undersigned, do hereby guaranty to the said D. B. Fiske & Co. prompt payment of all such bills at their maturity, the same being four months from the date of purchase or order, hereby waiving any and all notice of times or amounts of sales, or of defaults or delays in payment

* See *Thompson v. Glover* (78 Ky. 193), 39 Am. Rep. 230, and note, 231.

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therefor, the amount guaranteed not to exceed the sum of _____ at any one time."

Crittenden received this paper, struck out the words "at any one time," filled the blank with two hundred dollars, signed and returned it to the plaintiffs. In reliance upon it the plaintiffs sold Mrs. Coe goods from time to time from May 10, 1877, to July 24, 1878. At this last date she was owing them \$242.93. Her total purchases had exceeded \$800, and had been reduced by payment and other allowances to the sum named. No notice of the acceptance of the guaranty was given by the plaintiffs to Crittenden until after the dealings with Mrs. Coe had ceased.

I. Crittenden insists that this guaranty had fully performed its office when goods to the amount of two hundred dollars had been sold to Mrs. Coe in reliance upon it, and it was not continuous thereafter. If he is right in this, he was wholly discharged when the purchases first made to the amount of two hundred dollars had been paid for. But we do not agree in this construction. He agreed to guaranty the bills purchased from "time to time" on four months' credit; and plainly contemplated that the payments as well as purchases would be continuous, leaving him still liable in a guaranteed amount not to exceed two hundred dollars. The case is not unlike *Mason v. Pritchard*, 12 East, 227, in which the guaranty was "for any goods he hath or may supply my brother W. P. with, to the amount of 100l.," and in which "all the court were of opinion with the plaintiff that this was a continuing or standing guaranty to the amount of 100l. which might at any time become due for goods supplied until the credit was recalled." The cases of *Hargreave v. Snee*, 6 Bing. 244; *Douglass v. Reynolds*, 7 Pet. 113; *Bent v. Hartshorn*, 1 Metc. 24; *Halch v. Hobbs*, 12 Gray, 447; *Melendy v. Capen*, 120 Mass. 222; *Gates v. McKee*, 13 N. Y. 232; *Rindge v. Judson*, 24 id. 64, and *Grant v. Ridsdale*, 2 Har. & J. 186, support the same view, and some of them in their facts bear close resemblance to the case before us. If the guaranty had evidently contemplated a single transaction, it would have been different. *Anderson v. Blukely*, 2 W. & S. 237; *Boyce v. Ewart*, 1 Rice (S. C.) 126; *Hotchkiss v. Barnes*, 34 Conn. 27; *Congdon v. Read*, 7 R. I. 576; *Strong v. Lyon*, 63 N. Y. 172; *Boston, etc., Co. v. Moore*, 119 Mass. 435; *Reed v. Fish*, 59 Me. 358.

The defendant relied very much upon the fact that the words "at any one time" were struck out by him, as showing clearly that he

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only meant to be liable for purchases aggregating two hundred dollars. But these words as they stood might have made the defendant liable for purchases in excess of two hundred dollars if they had been made at different times ; and the inference from their being stricken out is only this : that defendant declined to accept responsibility exceeding two hundred dollars ; not that he intended to limit the guaranty to the first purchases aggregating that sum.

II. We do not think defendant was entitled to notice of acceptance. The guaranty was absolute in its terms, but neither party was bound by it until it had been acted upon. The acceptance by the plaintiffs consisted in their making sales in reliance upon it ; until that had been done defendant was at liberty to withdraw the guaranty, and plaintiffs were at liberty to decline to deliver goods upon it even if they had verbally promised to do so. When therefore defendant in a guaranty absolute in form waives "any and all notice of times or amounts of sales," it is evident he does not expect notice of acceptance.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

PRESTON V. YOUNG.

(46 Mich. 108.)

Statute of frauds — promise to pay another's debt.

Manufacturers contracted with lumber dealers to convert certain standing timber into shingles and siding. A logger contracted with the manufacturers to cut and haul the timber. Subsequently the dealers orally promised the logger to pay him on orders from the manufacturers. Several payments were so made, and then payment being refused, this action was brought to enforce it. *Held*, not maintainable.*

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Smith & Sessions, for plaintiff in error.

* See to same effect, *Belknap v. Bender* (75 N. Y. 446), 81 Am. Rep. 476.

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Ellsworth & Sapp, for defendant in error.

GRAVES, J. July 6, 1878, Preston & Merriam entered into a written contract with John A. Taft and Amasa Wilder by which the latter agreed to place a shingle and siding mill on certain premises specified, and convert the pine timber thereon into shingles and short siding, for which said Taft & Wilder were to have three-fourths of said shingles and two-thirds of the siding. It was also agreed that Preston & Merriam should have the right of selling Taft & Wilder's share of the shingles at market price in lots not to exceed two and one-half millions at a time, except one-tenth to be deliverable to Hayes & Webber as fast as cut, and that five cents per thousand should be allowed and paid for this service.

The contract further provided that whenever Taft & Wilder should deliver at the railroad two hundred and fifty thousand shingles, Preston & Merriam should advance to them two dollars per thousand on stars and one dollar per thousand on No. 1.

The arrangement was to continue for two years from October 10, 1878, unless in consequence of some default on the part of Taft & Wilder, Preston & Merriam should elect to terminate it sooner. It is needless to refer to the other stipulations.

Taft & Wilder erected the mill, and then bargained with Young to take the timber standing, cut and haul it to the mill, and place it on the roll-way for thirty-five cents per thousand. Young consequently became a sub-contractor under Taft & Wilder for part of the service they had agreed to render. The transactions were not dependent but in contemplation of law entirely distinct. The duties and obligations pertaining to each were exclusive of the duties and obligations of the others. The parties to one could hold each other to payment and performance without regard to the other, and neither contract could be impaired except by its own parties. All this may be supposed to have been well understood by the plaintiff and defendants.

Young went on under his contract with Taft & Wilder until into February, at which time he had about 3,800 logs in the mill yard. He had run up a debt to Merriam for feed and Taft & Wilder were owing him a larger sum. He complained of being unable to obtain payment, and proceeded to call on Preston & Merriam in order to effect some arrangement, and this action depends on the transaction which then occurred. The interview was at

Edmore. Taft & Wilder were neither present nor concurred in it. Preston & Merriam were both present, and Preston's son was also by. They agree as to what the arrangement was, but contradict Young. There was no writing. As the case is presented it is necessary to confine attention to Young's version.

He testifies that he told Preston & Merriam he could stock the mill no longer unless they paid him ; that he could not work without money ; that he claimed the logs as his until paid his thirty-five cents per thousand, and that if they did not pay him, he would take the logs to another mill, to get something out of them, that he asked if they could not pay him something on the amount already due him from Taft & Wilder ; that Merriam then agreed to credit him on his individual account for the accrued indebtedness, and Preston agreed, that if he would go on and stock the mill for them, they would pay him the money on each lot of 371,000 shingles, provided he brought orders from Taft & Wilder ; that with this understanding he went on, and thereafter obtained orders from Taft & Wilder on Preston & Merriam, and the latter continued to cash them until July ; that he then went to see them to make a final settlement, and "they claimed another bargain" and refused to pay the residue of his demand. He also testifies that he had nothing to do with Taft & Wilder ; that he did not work for them and was not to look to them for his pay.

This is nothing more than an explanation of what his purpose was and an expression of his own idea of the nature and effect of the transaction. It cannot control the legal operation of the undoubted facts. The orders were all drawn with direct reference to the liability of Preston & Merriam to Taft & Wilder under their written contract, and they all plainly and positively recognized that that contract continued pending and operative in favor of Taft & Wilder against Preston & Merriam, and their purport plainly negatived the idea of their being instruments to carry out a new original agreement between Young and plaintiffs in error for stocking the mill. No ordering by Taft & Wilder of the kind thus made use of and acted on by Young and plaintiffs in error would have been necessary or appropriate in respect to a distinct original agreement to which Taft & Wilder were not parties. These orders are of great force as evidence of the actual construction which the parties themselves put on the transaction. It was only through them that Young obtained the money from plaintiffs in error under the arrange-

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ment at Edmore, and it was on them alone as requests of Taft & Wilder, to pay, and as vouched against Taft & Wilder that the plaintiffs in error made payment. Preston & Merriam were not discharged from their liability to Taft & Wilder, and the extent of their undertaking to Young was to pay him whenever by so doing the payment would apply on their liability to Taft & Wilder. They did not mean to be liable twice over for the same thing : once to Taft & Wilder and again to Young, and they took pains to avoid it. Their agreement with Young was not an original one ; but merely an undertaking to pay on the debt or obligation of Taft & Wilder as the latter should order, and hence it contemplated a novation in just so far as it should be actually carried out. In short, the essential feature of the arrangement was that Taft & Wilder, were to be Young's debtors, and hence in a situation in which it would be practicable and appropriate for them to order the plaintiffs in error as their debtors to make payment to him.

Taking Young's testimony in connection with the orders which are not questioned, it makes a case which admits of only one construction. The promise relied on is within the statute of frauds, and not enforceable for want of writing. Comp. L., § 4698, subd. 2. It was an undertaking to pay for Taft & Wilder. The version given by the defendants of the transaction at Edmore most manifestly entitled them to a verdict if believed. The court however refused a request to that effect, and submitted the case under instructions which authorized the verdict in Young's favor.

The judgment should be reversed with costs and a new trial granted.

The other justices concurred.

KELLOGG V. LOVELY.

(46 Mich. 131.)

Mortgage — chattel — on pregnant mare.

A purchase-money mortgage on a pregnant mare covers the colt unless it is weaned before the maturity of the mortgage. *

TRESPASS on the case. The opinion states the case. The defendant had judgment below.

*See *Sawyer v. Gerrish* (70 Me. 254), 35 Am. Rep. 323.

McBride & Fraser, for plaintiff in error.

McKercher & Bush, for defendant in error.

GRAVES, J. The circumstances of this controversy are as follows: In October, 1878, the defendant, Lovely, sold the plaintiff Kellogg, on credit, a mare, buggy and harness for the agreed price of \$250, and the plaintiff gave his note together with a mortgage on the property for the entire sum.

The mare was with foal, and about the first of June following she dropped the colt. On the first of July the mortgage became due, and Kellogg failing to pay, Lovely proceeded to take the property. There was no dispute about his right to take the mare, buggy and harness, but the parties appear to have differed about the colt. Lovely maintained that the mortgage applied to it and gave him the same right to the colt that it did to the mare, but Kellogg contested this claim and contended that the colt being the offspring of the mare was his property, and not having been born when the mare was purchased, the mortgage given was not subject to the mortgage.

The colt had not been weaned and was running with the mare, and when Lovely drove her off the colt followed. Lovely soon afterward proceeded to sell the whole property, the colt included, under the mortgage, and we gather from the case that it was bought in by him through an agent. The whole sum for which the property was struck off was \$176, and shortly afterward Kellogg paid the remainder of the debt. He then instituted replevin against Lovely, before a justice of the peace, to obtain the colt, and it was seized on the writ and delivered into his possession. The justice entered a nonsuit against him, and Lovely waiving return of the colt, the value was assessed at \$55, for which Lovely took judgment. An appeal was made and the Circuit Court reduced the assessment to \$30 and awarded Kellogg \$78 costs, and extinguished the former by applying an equal amount of the latter by way of set-off. Thereupon Kellogg sold the colt and brought this action of trespass, counting on the transaction when Lovely took the mare on the mortgage. The justice gave judgment in Kellogg's favor for the value of the colt, and Lovely appealed. The Circuit judge ruled that there was no evidence of trespass and ordered a verdict for Lovely. It is not certain that the Circuit judge was correct in the

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reason on which he proceeded. But whether he was so or not is unimportant unless the result was wrong.

The fundamental question in the case relates to the effect, on the legal ownership of the colt, of the sale of the mare to Kellogg and the mortgage back.

In respect to tame and domestic animals the general rule is well understood, that "the brood belongs to the owner of the dam or mother" (2 Bl. Com. 390), but there are many cases in which the rule is qualified in its application. It has been held and may be true in special cases that where the female is hired for a time limited and has increase during the term, the hirer will be entitled to it and not the general owner. 2 Kent Com. 361; Edw. on Bailm., § 403; *Putnam v. Wyley*, 8 Johns. 432 (5 Am. Dec. 346); *Concklin v. Havens*, 12 id. 314; *Hanson v. Millett*, 55 Me. 184; *Stewart v. Ball*, 33 Mo. 154. And so too it was decided in *Linnendoll v. Terhune*, that a foal obtained under an agreement by which the owner of the mare arranged with another person that if he would put her to horse and pay the expense he should have the foal, became the property of such person. 14 Johns. 222.

It is also laid down by Judge STORY that where a thing is pledged its natural increase as accessory is also pledged, and he gives by way of illustration the case where a flock of sheep are pledged, and observes that the young afterward born are also pledged. Bailments, § 292; and see Domat, part 1, book 3, tit. 1, § 1, art. 7; Kaufm. Mackeldey, book 1, § 267. In Iowa and Kentucky, and probably in other States, it has been decided that the young of animals under mortgage are subject to the mortgage (*Forman v. Proctor*, 9 B. Monr. 124; *Thorpe v. Cowles*, 55 Iowa, 408); and no cases to the contrary have been discovered. Perhaps these last decisions may have originated in the doctrine that the mortgagee of chattels is the legal owner; and the courts may have considered that in holding the young of mortgaged animals to be subject to the mortgage, they were only applying the general rule which assigns the increase to the owner of the mother. But it is useless to speculate on the subject. The case before the court belongs to a peculiar and exceptional class, and it may be disposed of without bringing into question the general doctrine. As previously stated, the mare was carrying her colt when Lovely sold her, and the plaintiff, not paying any thing whatever, gave back at the same moment a chattel mortgage for the entire price. There was no interval of time between the

sale and mortgage. Each took effect at the same instant. The whole was substantially one transaction. Now it is a rule of natural justice that one who has gotten the property of another ought not, as between them, to be allowed to keep any part of its present natural incidents or accessories without payment, and that the party entitled should have the right to regard the whole as being subject to his claim. The one ought not to suffer loss, nor the other effect a gain, through a mere shuffle, and whatever fairly belongs to the thing in question, as the young the dam is carrying belongs to her, ought to be as fully bound as the thing itself, unless indeed there are circumstances which imply a different intention.

It is not unreasonable to construe the acts of these parties by these principles and to consider that when Lovely sold the mare without receiving any thing down, and Kellogg gave back the mortgage for the whole purchase price to be due before the colt, according to the ordinary course of things, would be old enough to be separated from the mare, it operated as well to hold the colt as to hold the mare herself. The intendment is a fair and just one that the security was to be so far beneficial to Lovely as to preserve to him the right to claim at the maturity of the mortgage the same property he would have had in case he had made no sale. According to this view there was the same right to the colt as to the mare, and the act of seizure sued for was not a trespass.

The result ordered by the Circuit judge was therefore correct, and the judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

DE MAY V. ROBERTS.

(46 Mich. 160.)

Trespass on the case — intrusion at child-bed.

Where a physician takes an unprofessional unmarried man with him to attend a case of confinement, and no real necessity exists for the latter's assistance or presence, both are liable in damages to the woman, although she supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence.

De May v. Roberts.

CASE. The opinion states the facts. The plaintiff had judgment below.

H. & H. E. Walbridge, for plaintiffs in error.

J. H. Kimball and J. K. Wright, for defendants in error.

MARSTON, C. J. The declaration in this case in the first count sets forth that the plaintiff was, at a time and place named, a poor married woman, and being confined in childbed and a stranger, employed in a professional capacity defendant De May who was a physician ; that defendant visited the plaintiff as such, and against her desire and intending to deceive her wrongfully, etc., introduced and caused to be present at the house and lying-in room of the plaintiff and while she was in the pains of parturition the defendant Scattergood, who intruded upon the privacy of the plaintiff, indecently, wrongfully and unlawfully laid hands upon and assaulted her, the said Scattergood, which was well known to defendant De May, being a young unmarried man, a stranger to the plaintiff and utterly ignorant of the practice of medicine, while the plaintiff believed that he was an assistant physician, a competent and proper person to be present and to aid her in her extremity.

The second and third counts while differing in form set forth a similar cause of action.

The evidence on the part of the plaintiff tended to prove the allegations of the declaration. On the part of the defendants evidence was given tending to prove that Scattergood very reluctantly accompanied Dr. De May at the urgent request of the latter ; that the night was a dark and stormy one, the roads over which they had to travel in getting to the house of the plaintiff were so bad that a horse could not be ridden or driven over them ; that the doctor was sick and very much fatigued from overwork, and therefore asked the defendant Scattergood to accompany and assist him in carrying a lantern, umbrella and certain articles deemed necessary upon such occasions ; that upon arriving at the house of the plaintiff the doctor knocked, and when the door was opened by the husband of the plaintiff De May said to him, "that I had fetched a friend along to help carry my things ;" he, plaintiff's husband said "all right," and seemed to be perfectly satisfied. They were bidden to enter, treated kindly, and no objection whatever made to the presence of defendant

Scattergood. That while there Scattergood, at Dr. De May's request took hold of plaintiff's hand and held her during a paroxysm of pain, and that both of the defendants in all respects throughout acted in a proper and becoming manner, actuated by a sense of duty and kindness.

Some preliminary questions were raised during the progress of the trial which may first be considered.

The plaintiff when examined as a witness was asked, what idea she entertained in reference to Scattergood's character and right to be in the house during the time he was there, and answered that she thought he was a student or a physician. To this there could be no legal objection. It was not only important to know the character in which Scattergood went there, but to learn what knowledge the plaintiff had upon the subject. It was not claimed that the plaintiff or her husband, who were strangers in that vicinity, had ever met Scattergood before this time or had any knowledge or information concerning him beyond what they obtained on that evening, and it was claimed by the defendant that both the plaintiff and her husband must have known, from certain ambiguous expressions used, that he was not a physician.

We are of opinion that the plaintiff and her husband had a right to presume that a practicing physician would not, upon an occasion of that character, take with him, and introduce into the house, a young man in no way, either by education or otherwise, connected with the medical profession; and that something more clear and certain as to his non-professional character would be required to put the plaintiff and her husband upon their guard, or remove such presumption, that the remark made by De May that he had brought a friend along to help carry his things. The plaintiff was not bound however to rest her case upon this presumption, however strong it might be considered, but had a right to prove what she supposed was the fact, and this she could do by showing any thing said at the time having such a tendency, or in the absence thereof what she actually believed to be the fact.

[Minor matter omitted.]

It yet remains to consider the principal questions raised in the case. They relate to the sufficiency of the declaration, to which the general issue was pleaded, and farther that admitting the facts to be true as claimed by the plaintiff, she was not entitled to recover. We need not consider the question as to what the effect would be

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had the jury found that the plaintiff knew the non-professional character of the defendant Scattergood, and made no objection or consented to his remaining in the house or rendering such assistance as was demanded. Upon this branch of the case the court charged the defendants would be justified in doing what they did, if the plaintiff or her husband consented to Scattergood being there, with a full understanding of, or with good reason to believe or know of the character in which he was there. This certainly was placing the matter in a sufficiently favorable position for the defendants.

A few facts which were undisputed may assist in more clearly presenting the remaining question. Upon the morning of January 3, Dr. De May was called to visit the plaintiff professionally, which he did at her house. This house is fourteen by sixteen feet. A partition ran partly across one end thus forming a place for a bed or bedroom, but there was no door to this bedroom. Next to this so-called bedroom, and between the partition and side of the house, there was what is known and designated as a bed sink ; here there was a bed with a curtain in front of it, and it was in this bed the doctor found Mrs. Roberts when he made his first visit. On their way to the house that night De May told Scattergood, who knew that the plaintiff was about to be confined, "how the house was ; that she was in the bed sink back, and there was a curtain in front of her, and told him he need not see her at all." When the defendants got to the house they found Mrs. Roberts "had moved from the bed sink and was lying on the lounge near the stove."

I now quote farther from the testimony of Dr. De May as to what took place :

"I made an examination of Mrs. Roberts and found no symptoms of labor at all, any more than there was the previous morning. I told them that I had been up several nights and was tired and would like to lie down awhile ; previous to this however, some one spoke about supper, and supper was got, and Scattergood and myself eat supper, and then went to bed. I took off my pants and had them hung up by the stove to dry ; Scattergood also laid down with his clothes on. We lay there an hour or more, and Scattergood shook me and informed me that they had called and wanted me. Scattergood got my pants and then went and sat down by the stove and placed his feet on a pile of wood that lay beside the stove, with his face toward the wall of the house and his back partially toward the couch on which Mrs. Roberts was lying. I made an examination

and found that the lady was having labor pains. Her husband stood at her head to assist her ; Mrs. Parks upon one side, and I went to the foot of the couch. During her pains Mrs. Roberts had kicked Mrs. Parks in the pit of the stomach, and Mrs. Parks got up and went out doors, and while away and about the time she was coming in, Mrs. Roberts was subjected to another labor pain and commenced rocking herself and throwing her arms, and I said " catch her," to Scattergood, and he jumped right up and came over to her and caught her by the hand and staid there a short time, and then Mrs. Parks came up and took her place again and Scattergood got up and went and took his place again back by the stove. In a short time the child was born. Scattergood took no notice of her while sitting by the stove. The child was properly cared for ; Mrs. Roberts was properly cared for, dressed and carried and placed in bed. I left some medicine to be given her in case she should suffer from pains."

Dr. De May therefore took an unprofessional young unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear at least, if not see all that was said and done, and as the jury must have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice and propriety even to doubt but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one, and no one had a right to intrude unless invited, or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time she consented to the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterward ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterward sustained, from shame and mortification upon discovering the true character of the defendants.

Where a wrong has been done another, the law gives a remedy,

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and although the full extent and character of the injury done may not be ascertained or known until long after, yet in an action brought damages therefor may be fully awarded. This is true both in cases of tort and crime as well as in actions for breach of contract. The charge of the court upon the duty and liability of the defendants and the rights of the plaintiff was full and clear, and meets with our full approval.

It follows therefore that the judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

VAN HORN V. PEOPLE.

(46 Mich. 183.)

Taxation — of dogs — constitutionality.

A law taxing dogs and appropriating the proceeds to payment of damage done by dogs to sheep is a constitutional exercise of police power.

CONVICTION of refusing to list dogs for taxation. The opinion states the case.

B. T. O. Clark, for plaintiff in error.

Jacob J. Van Riper, attorney-general, for people.

GRAVES, J. The defendant holding the office of supervisor refused to execute the statute of 1877 (Public Acts of 1877, p. 239), and for such delinquency was prosecuted and convicted under the eighth section. The case was then certified to this court for review on exceptions. The scheme embodied in the statute is intended to compel those who own and keep dogs to provide a common fund for repairing or at least mitigating such losses as are inflicted by those animals by wounding and destroying sheep. It was not necessary for the face of the enactment to explain the proneness of dogs to such mischief. The fact is notorious and the mention of it as an incentive to the legislation would have been useless.

The exceptions are all grounded on a single assumption. And it would be needless to inquire as to how far the inferences and secondary propositions are authorized. The fundamental proposition is that the exaction attempted by the statute is a tax within the meaning of article 14 of the Constitution ; and taking this for granted it is then argued that it is not a specific tax, but a tax falling under rules and principles applicable to other taxes ; and not being laid according to any mode of uniformity nor assessed according to the cash value of the property, the imposition is unconstitutional. It is also suggested that dogs are included in the mass of property annually taxed under the general law and that it is not competent to select one species of property and subject it to double tax. It is unnecessary to point out the various inaccuracies of this reasoning. The foundation on which it proceeds is fallacious. The supposition that the statute is an emanation from the taxing power, in the sense in which that power is regarded by article 14, is a mistake.

The enactment does not appear to be for revenue nor to raise money by way of tax, as that expression is there made use of. A tax in the view of that division of the Constitution is a burden, charge or imposition for public uses (*People v. Salem*, 20 Mich. 452; *Matter of Mayor*, 11 Johns. 77) and not a mere regulative expedient, as this is, to favor the repression of private mischief and promote the redress of private injuries. And it is plain therefore that the act can neither be brought within article 14 for the purpose of sustaining it nor for the purpose of overthrowing it. It is a species of legislation which pertains to another department of power, and where the State in pursuing its duty to accommodate as far as practicable the desire and the right to keep dogs, to the more beneficial right of breeding and keeping sheep, has seen fit to apply the method marked out in this statute. The act is an exertion of the police power, and no reason is perceived for denying its validity. In consequence of the acknowledged excellence of some of their traits and their remarkable attachment to mankind, and on account, at the same time, of their liability to break through all discipline and act according to their original savage nature, and because also of their liability to madness, it has been customary always to make dogs the subject of special and peculiar regulations. The evidence found in our own statutes is very full. Act of 1805, 1 Terr. L., p. 69; Act of 1825 ; Code of 1827, p. 481 ; Rev. Stat. 1838, p. 220 ; id

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1846, p. 201 ; Act 161 of 1850, Sess. L., p. 155 ; Act 210 of 1863, Sess. L., p. 362 ; Act 205 of 1865, Sess. L., 340 ; Act 195 of 1873, Sess. L., vol. 1, p. 483.

Characteristic legislation has been expounded in other States, and the authority for it has been liberally maintained under the power referred to. *Blair v. Forehand*, 100 Mass. 133 (1 Am. Rep. 94); *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, id. 566; *Mitchell v. Williams*, 27 Ind. 62 ; *Morey v. Brown*, 42 N. H. 373 ; *Woolf v. Chalker*, 31 Conn. 121; *Ex parte Cooper*, 3 Tex. Ct. App. 489; s. c., 30 Am. Rep. 152.

As the charge laid on the owners of dogs is a pecuniary burden imposed by public authority, it partakes no doubt of the character of a tax, and for many purposes might be so spoken of without harm. But no accession of public revenue, either general or local, is authorized or aimed at. The end sought is different. The purpose is to prescribe a regulation under which dogs as animals dangerous to sheep and of far less public utility, can alone be held, and which if carried out will tend to discourage an undue increase of dogs, and at the same time will afford new protection against the effects of the mischief to which they are most given. As no sufficient reasons are disclosed for sustaining the exceptions, they must be overruled, and the Circuit Court is advised to proceed pursuant to law.

Exceptions overruled.

The other justices concurred.

 SMITH V. FLINT AND PERE MARQUETTE RAILWAY COMPANY.

(46 Mich. 258.)

Master and servant — negligence — car from another road — fellow servant.

A brakeman in coupling freight-cars for the defendant was injured by a loose dead-wood on a car which had come from another road. The defendant had competent inspectors whose business it was to reject such cars. *Held*, that the brakeman could not recover of the defendant.*

TRESPASS on the case. The opinion states the facts. The defendant had judgment below.

* See *Ballou v. Chicago, etc., R. Co.* (54 Wis. 250), 41 Am. Rep. 81, and note.

Smith v. Flint and Pere Marquette Railway Company.

Hanchett & Stark and *H. J. Hoyt*, for plaintiff in error.

Wisner & Draper and *Wm. L. Webber*, for defendant in error.

CAMPBELL, J. Plaintiff, who was a brakeman on the railroad of which defendant was receiver, sues for an injury which he received by having an arm crushed while coupling cars. The accident is shown to have happened while plaintiff was attempting to couple two cars which had been brought loaded to Monroe by another road, and the occasion of it is said to have been the loosening and leaning down of the dead-woods of one car which was rather lower than the other, whereby, as the two came together, the dead-woods of the lower car went partially under those of the higher one and caught plaintiff's arm. The accident happened at night, when plaintiff's train was somewhat behind time and hurried. It appeared that at Monroe, as at other railroad junctions, the various roads had their own inspectors to examine cars brought in by or to be attached to their trains, and that this car was not reported as dangerous by either of the inspectors of the road that brought it to Monroe or of the road on which plaintiff was employed.

The Circuit Court for the county of Saginaw, after hearing all the evidence, directed a verdict for defendant. No argument was made on the right to sue defendant as receiver, and the case has been treated as presenting no question but those relating to negligence and its effects. And the only question under this head seems to be whether plaintiff as a person under employment can sue his employer, for the negligence of persons who are claimed to have been in fault for not making a thorough inspection.

While there may be other matters that may be open to remark, we do not think that we can properly consider, as against the plaintiff, any other question.

The case has been very thoroughly presented, but after careful reflection we cannot see any principles involved in it which have not been so fully passed upon by our previous decisions as to render renewed discussion superfluous.

The statutes of this State make it the duty of every railroad to receive and forward cars of other roads impartially and diligently. This does not require the transfer of cars unfit for passage. But it does require that no unnecessary delays or hindrances shall be interposed, and that all precautions against the use of improper cars

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shall be adopted with reference to reasonable dispatch. It appears by this case, and we are bound to know as part of the general knowledge of the business community, that the railroads of the country conduct their inspections under a generally understood system which all persons so employed on the roads as to be interested are presumed to understand. It further appears that the road now in question employed the usual servants for that purpose, and there is nothing to indicate that there was any negligence in their employment or retention.

We cannot conceive any good reason for holding that the risk of occasional errors on the part of such persons is not one of those risks which naturally attend the shifting of cars from one road to another, and which consequently every brakeman or other person employed in handling them incurs as a part of his employment. There is no difference in the nature of the danger, or in the quality of the inspector's employment, between the case of shifting cars belonging to other roads and cars belonging to the same road. Defects in both lead to the same results, and the methods of examining both are identical. Where a car has been damaged by some injury which has escaped notice, it cannot fairly be said that employers ignorant of it, who have taken all usual and reasonable precautions against it, are any more to blame in the one case than in the other. The duty of the inspectors passing the cars from road to road is of no different nature from that of other persons who have similar duties of vigilance. Conductors and brakemen have similar precautions to exercise in their respective callings, and the safety of such employees may be affected in numerous ways by neglect of careful scrutiny. They are in the strictest sense fellow servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers. When a brakeman handles any car, he knows there is at least a possibility that he may be injured, unless he examines it carefully. It may not always be legal negligence in him to rely with some assurance on the accuracy of the persons who should have examined it before it comes to him. But he is bound to know that omissions of such care are possible, and are dangerous if they occur. And he is also bound to know, as all men know, that it is impossible for employers to completely guard against it.

As we have frequently held, in accordance with what we conceive to be the legal rule, such actions as the present are based on actual

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negligence of the defendant sued or of some representative who is held in law to personate him. And in such a business as requires the employment of a multitude of persons beyond the possible constant supervision of either the ultimate or representative principal, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require. When the principal has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them.

In the present case he appears beyond dispute to have done all this, and if the inspectors committed an error, or were guilty of negligence, he is not to blame for it. The work done is to be done at all hours and at every place where there are railroad connections with other roads. It is not a duty of management or general supervision but a task for which nothing is required but fidelity, and mechanical knowledge of a comparatively limited kind. It is such work as would seldom be delegated to an officer of extensive responsibility who has other interests to look after. But whatever be its quality, it was in this case not claimed to have been placed in wrong hands. Nothing more could be asked of the employer.

The questions bearing on these duties and liabilities have been passed upon in several cases, which under different circumstances illustrate the same general rules. *Mich. Cent. R. R. Co. v. Leahoy*, 10 Mich. 199; *Davis v. D. & M. R. R. Co.*, 20 id. 105; *Mich. Cent. R. R. Co. v. Dolan*, 32 id. 510; *Fort Wayne, J. & Sag. R. R. Co. v. Gildersleeve*, 33 id. 133; *Botsford v. M. C. R. R. Co.*, id. 256; *Chicago & N. W. R. Co. v. Bayfield*, 37 id. 205; *G. R. & I. R. R. Co. v. Huntley*, 38 id. 537; s. c., 31 Am. Rep. 321; *M. C. R. R. Co. v. Austin*, 40 Mich. 247; *Day v. Toledo, C. S. & D. R. Co.*, 42 id. 523; *Quincy Mining Co. v. Kitts*, id. 34; *Mich. Cent. R. R. Co. v. Smithson*, 45 id. 212.

We do not think it necessary, in view of our own decisions, to review the cases elsewhere, which are not all consistent or harmonious. The court below undoubtedly relied on the rulings of our own reports, and there is no error in his decision.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

Randall v. Chubb.

RANDALL V. CHUBB.

(46 Mich. 311.)

Lease — of land on shares — assignability.

A lease of land to be worked on shares with the lessor's implements is not assignable.

PROCEEDINGS to recover possession of land. The opinion states the case. The plaintiff had judgment below.

Waddell & Montague, for plaintiff in error.

MARSTON, C. J. The evidence fully sustains the finding of facts in this case.

Chubb leased the premises in question to Ayers Stoddard for the term of three years, with the privilege of five, upon shares. Stoddard was to do all the work, find all the seed and to deliver to the lessor one-third the crops. The farm was to be cropped in a certain specified way, and the lessee was to have the use of certain farm implements of the lessor, and was to take good care of them and repair them at his own expense during the term of the lease. This lease and his rights thereunder the lessee afterward undertook to assign to the plaintiff in error, and under circumstances of questionable good faith, and these proceedings were instituted by the lessor to recover possession of the premises.

The judgment of the court below was correct. The very nature and character of the lease or agreement shows that it was a personal one to the defendant, and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive must depend very much upon the character of the lessee, and the latter could not place a party in possession of the premises, who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful, and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms. So with reference to the use of his farm implements, one might be a careful, prudent man, who would take good care of them, while another more reckless would

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not by the owner be permitted to use them upon any terms. The attempt to assign this lease and put another in possession thereunder worked a forfeiture thereof, and enabled the lessor to take immediate steps to regain possession.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

SULLINGS v. SHAKESPEARE.

(46 Mich. 408.)

Libel — misprinting communication in newspaper — mutual banter.

A newspaper publisher is not liable in damages for ludicrous but innocent misprints in a communication ostentatiously puffing the writer and describing a surgical operation by him.

Where an article ridiculing a person for ostentation was published in a newspaper as the result of mutual banter between the publisher and the person described, with the knowledge and assent of the latter, the question of libel is for the jury.

TRESPASS on the case. The opinion states the facts. The defendant had judgment below.

Oscar Tuthill, for plaintiff in error.

O. W. Powers, for defendant in error.

CAMPBELL, J. Sullings sued Shakespeare, who was publisher of the *Kalamazoo Gazette*, for publishing two alleged libels. One was claimed to be libellous because describing plaintiff as having performed a surgical operation by removing a “patty tuber” from the “hypogastrium” of one A. B. Smith. The other contained an account of a ride taken by plaintiff in Kalamazoo, written in a style tending to throw ridicule on plaintiff as displaying ostentation, and as not used to such indulgences.

The jury found a verdict for defendant. The case went throughout, and the charge also was based, on the theory that the articles, unless in some way explained or accounted for, were actionable. The

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chief objections to the rulings rest on the claim that as the case stood before the court they were favorable to the defense.

[Minor questions omitted.]

In the further discussion of this case, the two articles will require separate reference.

The court allowed defendant on cross-examination to explain that the article describing the surgical operation was not written by him. We can see no good reason for excluding this answer. Subsequently defendant testified fully on the subject and showed that the plaintiff wrote it himself and handed it to defendant with a desire that he should publish it, and it was accordingly handed over to the printers as it stood. There was evidence that it was very illegibly written, and there was no evidence of any intentional alteration, and none unless possibly by very remote inference, that there was any negligence. It was also testified by defendant that plaintiff complained to him of the error, but said if it could be corrected and put in the weekly he would be satisfied, and this was done. Plaintiff, when put on the stand, did not deny this, and was not examined at all concerning that article. There was no testimony whatever indicating that words had been altered in the article.

We think that this article could not under the circumstances go to the jury as a basis of damages. It does not occur to us that any necessary or natural inference would arise that the offensive words—which however are not shown to have been so written as to put any one in fault—were any more than a printer's blunder. We do not think a libellous meaning is apparent, although circumstances might put a different shade upon them.

But the article being written by plaintiff as a gratuitous puff of himself, and published at his request, we do not see how a mistake of the printers without wrongful intent could be held a malicious libel. This is not a suit on the case for damage from negligence, and the law of libel does not, we think, reach such a blunder, if any was made.

We cannot forbear, in the interest of public morality, to call attention to the fact that the plaintiff, if a physician, has no right to publish matters of professional confidence, and that the article if published as he wrote it, without the approbation of the person operated on, would have been a very plain breach of professional duty. Such publications, for no purpose of public instruction and only for private gratification or laudation, deserve severe censure.

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The matters included in the second article, which is undoubtedly written in a manner open to criticism, involve first, matters of fact, and second matters of comment. There was evidence to go to the jury on all the facts set forth in it, which were, when reduced to their plain meaning, substantially these, viz.: That on the day previous the plaintiff, who was described with some superfluous initials and appendages, rode about town in an ostentatious style as the sole occupant of an elegant chariot. That he was expecting large profits from a suit with the Vulcanite Rubber Company. The comments, which were interspersed, intimated that the excursion was by way of practice and in anticipation of a more exalted station when more style would be necessary. The article also satirically denies the truth of some further parade, and intimates that it was the first ride he had ever taken.

However offensive the whole article might have been, it was unquestionably competent for the defendant to show that the facts alleged were true or that any part of them were true, and also how far their truth would leave any remaining cause of action. It was also proper to show under what circumstances the article was prepared and published.

Upon this the testimony was not contradictory as to the fact that on a mutual banter, the local editor of the *Gazette* agreed to pay and did pay the driver of the vehicle, if the plaintiff would ride in it. It is uncontradicted that he told plaintiff he proposed to write an article on the subject, but there is a conflict as to the plaintiff's assent, and also as to the circumstances of the announcement. There was also evidence bearing on the Vulcanite litigation. Under these circumstances it is evident that plaintiff, upon his own statement, laid himself open to sharp comment, and upon defendant's proofs there was evidence going far enough, if believed, to make out an assent to the publication.

When the record was in such a condition, it certainly was for the jury to determine, under proper instructions, whether the article was really libellous, if we assume that it would have been so if unexplained. And we cannot regard any of the surroundings as irrelevant.

[Minor matters omitted.]

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

People v. McKay.

PEOPLE V. MCKAY.

(46 Mich. 429.)

Criminal law — assault — ejection from a railway station.

A railway station-keeper has no right to eject a passenger from the station for spitting on the floor.

CONVICTION of assault and battery. The opinion states the case.

Jacob J. Van Riper, attorney-general, for people.

Howell & Carr, for respondent.

CAMPBELL, J. McKay was convicted of assault and battery on Thomas Cooley, at the Grand Trunk station at Edwardsburg, in Cass county. McKay was station keeper, and the assault originated in an altercation between them caused by Cooley's spitting on the floor. He was smoking at the time, but no objection was made to this, and a question about it was properly held irrelevant. The defendant made a somewhat violent assault, and subsequently called in another servant of the company who compelled Cooley to leave the room, which he had refused to do at the demand of McKay. Cooley was a passenger on a train stopping temporarily at the station.

The court charged the jury very distinctly that if Cooley violated any rule made either by the company or the agent which had been brought home to his knowledge, the respondent had a right to require him to leave the waiting-room, and to remove him by such force as was necessary.

We think this charge was quite strong enough in favor of respondent. It is absurd to claim that the travelling community are bound to govern their behavior by the whims of an obstinate station-house keeper, or to leave the room whenever he thinks proper to drive them out. They are invited by the railroad company, and are entitled to remain there so long as they have occasion to do so, and commit no offense against the good order of the place and the reasonable regulations made to govern it.

The conviction was regular, and it must be certified to the court below that the people are entitled to judgment on it.

Judgment affirmed.

The other justices concurred.

RAYMOND V. LEAVITT.

(46 Mich. 447.)

Contract — immoral — cornering the market.

A loan for the purpose of making a "corner" in wheat cannot be recovered.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Otto Kirchner and C. A. Kent, for plaintiff in error.

Henry M. Cheever, for defendant in error.

CAMPBELL, J. Leavitt sued plaintiffs in error on the common counts, and served a bill of particulars in which the demands were set out under different forms and items as \$10,000 money lent, \$10,000 handed defendants for their use on their guaranty that it should be repaid in a reasonable time, \$10,000 deposit with them for their accommodation, and \$2,327.53 on account stated. He recovered \$3,027.53, which is claimed on the argument to have been made up by the sum of what is called an account stated, and an error of \$700.

The plaintiff's story on oath was that the sum of \$10,000 was advanced by him in May, 1880, to defendants for the purpose of controlling the wheat market at Detroit for what is called by the parties the May deal, with a view of forcing up prices, and producing what is understood as a corner, and compelling parties who had contracts to fill to pay a higher price for wheat to fill them. Defendants, as testified, were to give him a third of the expected profits, and to repay the \$10,000 with or without profits at all events.

Defendants claimed that Leavitt furnished the \$10,000 as a margin for these wheat transactions, and was to bear his risks, and that the speculations resulted in a loss.

At the end of July, 1880, defendants gave plaintiff three documents or statements, exhibiting transactions up to that time, in which he was treated as a party concerned in the transactions, and one of these papers showed in a brief way that at that time there was left of his share no more than \$2,327.50. This is now claimed to be an account stated.

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Several special questions were left to the jury and they found that there was no loan made, and that defendants, when they rendered these statements, understood the business was closed. They also negatived the giving of the money for the purpose of contracting for more wheat than could be delivered, and thus artificially raising the price.

If the testimony is properly printed, it does not appear distinctly that any one swore the purpose was merely to raise the price of wheat so as to get the advantage of those who should agree to sell to defendants themselves, but rather to so raise it as to compel all persons, who had wheat to deliver to anybody, to pay larger prices. The answer given by the jury does not fully meet the testimony.

We do not understand on what basis plaintiff recovered under his bill of particulars. He never advanced to defendants any sums except two \$5,000 items, amounting to \$10,000. If there was any money to be returned under his particulars it could have been no less than \$10,000. On the other hand both parties repudiated the idea that they had ever agreed on the July bills or any of them, as settling the amount due from one to the other; and there cannot be in law an account stated that neither party agrees to. It is impossible to support the judgment on any theory of the evidence that conforms to the demands of either party.

But the defendants, both at the close of plaintiff's case and at the close of the whole testimony, asked for instructions that the plaintiff should not recover, and in our opinion they should have been given.

The object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market for the express purpose of getting the advantage of dealers and purchasers, whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community is universally recognized. This alone may not be enough to make them illegal. But it is enough to make them so questionable that very little further is required to bring them within distinct legal prohibition.

The cases of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, and *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558; s. c., 23 Am. Rep. 190, held contracts involving similar dealings with

coal to be against public policy. And we think the reasoning of those cases is based on familiar common-law principles, which apply more strongly to provisions than to any other articles.

There is no doubt that modern ideas of trade have practically abrogated some common-law doctrines which are supposed to unduly hamper commerce. At the common law there is no doubt such transactions as were here contemplated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. Some of our States have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law of such cases. Where this has been done, as in New York, the statutes have replaced them by restraints on combinations for that purpose, leaving individual action free. In England there have been several statutes narrowing or repealing all of the ancient statutes, and more recently covering the whole ground. But so long as the early statutes only were repealed, it was considered that enough remained of the common law to punish combinations to enhance values of commodities. And when this doctrine became narrowed, it seems to have been considered that such combinations to enhance the price of provisions remained under the ban.

In *Rex v. Waddington*, 1 East, 143, and s. c., 1 id. 167, it was held the common law was still in force to punish engrossing the necessaries of life or provisions by single persons. The chief difficulty was in determining whether hops came within that rule, and it was held they did, and that the legislature only could change the law. The defendant was heavily fined. That case has been sharply criticised as not in harmony with modern political economy, and it no doubt goes beyond what would be considered proper among us. It has never, so far as the researches of Mr. Bishop have gone,—and he seldom over-looks important cases—been judicially disapproved, although statutes have been made to change the rule. See 1 Bish. Cr. L., §§ 527, 528, and notes to 6th edition. And he intimates that conspiracies for such purposes may perhaps be punished, even where the individual offense has been abolished. See also, vol. 2, §§ 202, 206, 216, 220, 230, 231 and notes.

In *Rex v. Hilbers*, 2 Chitty, 163, it was held that there must be a combination of more than one person before an information will be granted for enhancing the price of necessaries.

Mr. Russell gives it as his opinion that in our day single offend-

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ers would not be regarded as punishable unless their offense relates to provisions. 1 Russ. 170. But where there is a conspiracy the law has been given a much wider application, and the case of *Rex v. De Berenger*, 3 M. & S. 67, has obtained celebrity from the high rank of the offenders who were convicted — (and one of them at least, Lord Cochrane, unjustly) — of conspiring to raise the price of stocks by false rumors.

We have not referred to these cases to assert the propriety of enforcing common-law criminal penalties contrary to the general understanding of the business community. While these offenses have never been abolished in this State by statute, and might theoretically be therefore within the possible range of our laws, there would be no toleration of their strict prosecution against single persons to the common-law extent as crimes.

But the general sentiment has not led to any change in legislation or to any recognition of the legal propriety of allowing every species of produce gambling to be made susceptible of enforcement by contract. We must willfully shut our eyes before we can fail to see that a combination between a man who furnishes money and dealers who manipulate the market, where the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in prices, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worst kind of produce gambling, and it is impossible for any but dangerous results to come from it.

We do not feel called upon to regard so much of the common law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. The statute of New York, which is universally conceded to be a limitation of common-law offenses, is referred to in the case in 68 N. Y. 558 as rendering such conspiracies unlawful, and this had been previously held in *People v. Fisher*, 14 Wend. 9 (28 Am. Dec. 501), where the subject is discussed at length. There may be difficulties in determining conduct as in violation of public policy, where it has not before been covered by statutes or precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the law of the land, and we cannot save the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose the legislature, if attention were called to them,

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would not legalize them. We do not think public opinion has become so thoroughly demoralized ; and until the law is changed we shall decline enforcing such contracts. If parties see fit to invest money in such ventures they must get it back by some other than legal measures.

Judgment must be reversed with costs and a new trial granted. The other justices concurred.

ROSE v. VERTIN.

(46 Mich. 457.)

Contract — bishop engaging priest.

A bishop is not liable for the salary of a priest whom he has engaged.*

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

F. O. Clark, for plaintiff in error.

W. P. Healy, for defendant in error.

GRAVES, J. The plaintiff sued in character of assignee and owner of a claim of Joseph F. Bernbe for \$300 on account of services by said Bernbe as a priest in the now diocese of defendant. A verdict in defendant's favor was ordered by the court. Bernbe was placed in duty as an officiating priest by defendant's predecessor, Bishop Mrack, and the entire claim in suit arose during that bishop's time and before the defendant came in. The main facts in the case are undisputed and the only question is concerning their effect, and in my opinion they show distinctly that the relation between Bishop Mrack and the priest was never that of hirer and hired in any sense implying an obligation on the bishop to pay the priest. The bishop was the priest's superior and according to the established order of things in the economy of the church government, regulating the degrees of subordination and the methods of administration, it was the province of the bishop to designate the

* See *St. Patrick's Roman Catholic Church v. Gavalon* (62 Ill. 170), 25 Am. Rep. 305

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place for the priest to exercise his functions, and prescribe under certain limitations the rules and precepts for his guidance and control. But both were common servants of the church, and the service of the priest was not a service for the bishop, nor was the bishop in respect to the employment a principal. In the course of administration the bishop assigned the priest to a theater of duty and gave him certain rules and instructions, and it was manifestly understood on both sides that the bishop was not to be responsible in law for the salary. On the contrary the conclusion from the facts is unavoidable that the council of the congregation, on whom the diocesan regulations cast the duty to provide support for the clergy, were wholly trusted to supply the necessary means to pay the plaintiff's assignor. It was surely competent for Bernbe to serve in reliance on that resource and run the risk of failure and there is no doubt that he did so. Exactly similar arrangements are taking place every day. Men are constantly going into positions under appointment by superior agents and where no liability for compensation rests on the employing agent and the means of payment, if they come at all, are to come from another source.

Cases of illustration are infinite. They abound in business operations, and marked instances may be seen in the great missionary enterprises which are carried on. No one supposes the existence of a legal liability on the part of the appointing agency.

This view decides the case and makes it unnecessary to discuss the question whether in any event the present bishop could be held as the successor of Bishop Mrack.

The judgment is affirmed with costs.

Judgment affirmed.

The other justices concurred.

TUTTLE V. WHITE.

(46 Mich. 485.)

Damages — measure of — trover against innocent buyer from trespasser.

An innocent purchaser of logs from one who has got them by willful trespass is liable in trover to the owner for their value when the defendant first acquired them.*

* See *Tilden v. Johnson* (63 Vt. 698), 36 Am. Rep. 769, and note, 770.

TROVER. The plaintiff had judgment below, and brings error. The opinion states the case.

C. G. & W. W. Hyde, for plaintiff in error.

J. C. Fitzgerald, for defendant in error.

MARSTON, C. J. The action in this case was trover. The defendants purchased the logs in question from Sheridan & Hamilton, who cut them upon plaintiff's lands, and who were unquestionably trespassers in so doing. They, Sheridan & Hamilton, made no claim or pretense of having cut the logs under circumstances tending even to show good faith on their part. Sheridan & Hamilton sold the logs to defendants, afloat in Black creek. It was claimed, and we shall so assume, that defendants in making the purchase acted in entire good faith; they afterward ran the logs into Flat river and there sold them at an advanced price. The material question relates to the rule laid down as to the proper measure of damages. The court charged the jury in substance, that if the defendants in purchasing these logs acted in good faith, the rule would be either the value of the logs where they were cut on the ground, with the addition of any profit there might be in handling them and bringing them to Flat river, or the value at Flat river deducting the cost of bringing them there.

We are of opinion that the facts in this case did not warrant the charge as thus given. These defendants purchased from trespassers, and if they acted in good faith in so doing, all they could ask would be protection in what they should expend in money or labor thereon thereafter. A person however in purchasing personal property runs his risk as to the title he is acquiring, and if he is unfortunate enough to purchase from a trespasser or one who has no title and can give none, he must suffer the loss or look to his vendor. To hold otherwise would be to give the trespassers the benefit of their own wrong, contrary to all the authorities. If these defendants had only made a partial payment for the logs under their contract of purchase, and the plaintiff herein was limited in his recovery to the value of the logs when first severed from the land, then defendants would be the gainers; they would have the benefit of the trespasser's labor, and yet the latter could not maintain an action to recover the amount thereof, or the balance of the contract price.

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The conversion by these defendants took place when they first took charge or control over these logs in Black creek, and they should respond in damages according to the value at that time. The same reasons do not exist in this case to protect these defendants that did in *Winchester v. Craig*, 33 Mich. 210, and *Wetherbee v. Green*, 22 id. 311; s. c., 7 Am. Rep. 653.

There are very many cases where the value of the timber standing, or when first severed from the soil, would be but nominal, and to give willful trespassers, or those to whom they may sell, the benefit of any increased value put upon it by the original wrong-doer, and confine the owner to the nominal value, would but encourage the commission of acts of trespass, and tend to make purchasers at least careless as to the title they were acquiring. It is easy for any one to claim that he has purchased property in entire good faith, and very difficult in many cases to establish the contrary, and if one claiming to be such is protected to the extent of the increased value he may have in good faith added to the property, this is all he can fairly claim under the law. This rule in effect was held in *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332; s. c., 26 Am. Rep. 520, and much that was there said is equally applicable in the present case. We have not overlooked the case relied upon, among others cited, of *Railway Co. v. Hutchins*, 32 Ohio St. 584; s. c., 30 Am. Rep. 629. We have heretofore had occasion to examine the many cases there cited, and they do not lead us to any conclusion other than the one here arrived at.

We are of opinion that the judgment should be reversed with costs and a new trial ordered.

Judgment reversed.

The other justices concurred.

DOWNEY V. HENDRIE.

(46 Mich. 498.)

See post, *Nolan v. Brooklyn City and Newtown R. Co.*, note, 87 N. Y. 63.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY V. SMITH.

(46 Mich. 504.)

See *Cauley v. Pittsburgh, etc., Ry. Co.*, 95 Penn. St. 393; s. c., 40 Am. Rep. 664, note.

Cuddy v. Horn.

UPJOHN V. BOARD OF HEALTH.

(46 Mich. 542.)

See 89 Am. Rep. 16.

CUDDY V. HORN.

(46 Mich. 533.)

Negligence — ship-master — concurrent negligence.

The master of a vessel cannot escape responsibility for its safe management by intrusting it to a charterer.

A passenger on a public steamboat, injured by its collision with another, in consequence of the negligence of the officers of both, may hold both owners liable.*

CASE. The defendant had judgment below. The opinion states the facts.

Alfred Russell, James Caplis, Henry M. Campbell and H. M. Duffield, for plaintiff in error.

Wisner & Speed and John J. Speed, for defendant owner of the "Garland."

Moore, Canfield & Warner and H. H. Swan, for defendants owners of the "Mamie."

MARSTON, C. J. The following statement of facts taken from the briefs of counsel for the defendants is sufficiently full and accurate for a definite understanding and discussion of the legal questions raised.

The action was commenced by the plaintiff as administrator of the estate of John Kelley, deceased, to recover damages on account of his death caused by a collision between the steamer "Garland," of which the defendant Horn was owner, and the steam-yacht "Mamie," owned by the other defendants, on the Detroit river, July 22, 1880. The declaration alleged in substance that the Garland was going down the river upon a pleasure excursion, and the Mamie was coming up, returning from a pleasure excursion, and that Kelley was a passenger on the Mamie; that by failure of the master of the Garland to keep a proper lookout, and by his failure

*See *Masterson v. N. Y. Cent., etc., R. Co.* (84 N. Y. 247), 38 Am. Rep. 510.

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to give proper signals at the proper time upon the approach of said Mamie, as required by rule 3 for the government of pilots, and by reason of the failure of the master of the Mamie to give the proper signals to indicate upon which side she would pass, until the vessels had approached so near that a collision was inevitable, and by reason of the failure of the owner and master of the Mamie to keep a proper lookout upon said Mamie, said vessels collided, and said Mamie sank, causing the death by drowning of said Kelley.

The defendant Horn and the other defendants filed separate pleas of the general issue. The owners of the Mamie also filed a plea in abatement, alleging that proceedings had been commenced and were then pending in the District Court of the United States by them as owners of the Mamie, for the purpose of taking advantage of the statute of the United States limiting the liability of vessel-owners in certain cases. And special notice of such proceedings was also given with the plea of the general issue.

A trial was had upon this plea, and a verdict, by direction of the court, rendered for the plaintiffs thereon, and the trial thereupon proceeded upon the pleas of the general issue, and a verdict was rendered in favor of the defendants. The case comes here on writ of error, and the points relied upon by the defendants will be considered in order.

The position taken by the defendant Horn was, that the plaintiff's intestate was a passenger on the Mamie at the time of the alleged collision, and the Mamie having contributed to the collision, plaintiff's intestate must, in law, be held to have been so identified with those in charge of the yacht that he could not have recovered if he had survived, for an injury suffered by him occasioned by such collision, and that under the terms of the chartering or hiring of the yacht he could not have recovered for an injury so received.

It appeared that Rev. A. F. Bleyenbergh had chartered the steam-yacht Mamie to carry a party of altar-boys and others, twenty-one persons in all, and fourteen of them from eleven to fifteen years of age, from Detroit to Monroe and back, for which he was to pay twenty dollars, and that the yacht was in charge of the master and engineer thereof placed there by the owners. At the time of chartering the yacht it was stated that there would be about twenty persons to go on the trip, but no limit was placed upon the number or as to the particular route to be taken, in going to and returning from Monroe.

It has not been and could not be claimed that young Kelley had any authority or control whatever over the master or engineer of the yacht, or that he could have changed or directed the movements of the yacht in even the slightest degree. And while Father Bleyenberg, undoubtedly, we may assume, could and did have charge and control of the yacht, as to the time of starting, the number of passengers and such like, yet as to the due and proper management of the vessel, the steam she should carry, the speed at which she should be run, the course she should take within certain limits, the rules she should observe in meeting and passing other vessels, the lights she should carry, in a word, the laws and rules applicable to such craft while navigating the rivers and lakes, were matters over which he could not rightfully be permitted to have any control or direction whatever. These were matters which the master of the vessel could not legitimately turn over to the guidance or direction of any person who may have chartered the boat for a trip to and from a certain point. Had directions been given the master to run the yacht ashore, or upon a rock, or to run down upon and destroy a row-boat, or not to give or answer the necessary signals when approaching another vessel, or to not carry proper lights, clearly the master would have been under no obligations to obey such orders, and neither he nor the owners of the vessel could have justified such a departure from duty by setting up the authority or directions of Father Bleyenberg therefor. In this case it was the legal duty of the yacht to carry proper lights at night, and to give and answer certain signals in due and proper time when approaching another vessel, and what the law had thus directed to be done could not be varied, changed or controlled by any person who may have chartered the vessel for the occasion. And where a person can rightfully have no voice or control, he cannot be held so identified with those in charge as to be considered a party to their negligence. It seems to me that any other rule would but point out the way to owners of vessels in which they could violate all rules and regulations adopted to insure the safety of passengers without incurring any liability to them therefor. The reason for holding a person riding in a private conveyance identified with the driver thereof, and therefore affected by the negligence of the latter, cannot fairly or justly be held applicable in cases like the present. In the case of a private conveyance the driver is under the control and directions of the passenger, and if not, the latter may well decline to intrust

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his safety further in such conveyance. When however a person enters a public conveyance, and certainly a railroad train or a steamboat, he has no such control over the movements of either, and whether he may have chartered such conveyance for a special purpose or not, yet for a faithful observance of the rules of law enacted for the running or navigation thereof he cannot be held responsible in a case like the present, where the master is not his servant and is not subject to his directions or authority.

The authorities cited by counsel for plaintiff in error and which decline to follow *Thorogood v. Bryan*, 8 C. B. 115, should be followed in the present case. The charterer in this case did not appoint the officers of the boat, but was himself, and those who accompanied him, under and subject to their power in the navigation of the vessel, and if they, thus controlling the movements of the *Mamie* while running, and representing the owners thereof, were guilty of negligence in the performance of their duties, those on board have a remedy for injuries suffered in consequence thereof. See also *Covington T. Co. v. Kelly*, 36 Ohio St. 86; s. c., 38 Am. Rep. 558.

It was next insisted that there was no joint liability on the part of the defendants. This question is not free from embarrassment, and upon a trial the danger is that each defendant is interested in endeavoring to throw all the blame upon the other, and perhaps attempt to prove acts of negligence not set forth in the declaration. In opposition to this it may be said that negligence caused a collision by which plaintiff's intestate was killed, and that a remedy is given by statute to recover damages therefor; that if separate actions are brought different juries may acquit all the defendants, and thus the plaintiff be defeated, although his right to recover be unquestioned. Where therefore such embarrassments are likely to arise upon the trial, and bearing in mind that the plaintiff is without fault and is entitled to recover — at least we must so consider in the discussion of this question — is not the plaintiff who has thus suffered the wrong entitled to a remedy, and are not the difficulties and dangers to be thrown upon those presumably in the wrong rather than upon him who was not in fault? If in either view injustice is likely to be done, should not the defendants assume or be charged with the risk? Is there however likely to be any injustice done in holding them jointly liable? I think not. The facts are likely to be fully brought out on such a trial; neither will be interested in keeping back any thing tending to show that it was the other alone

that was in fault, and we cannot assume that any willfully false evidence will be given in the case. The facts are quite likely therefore to be fully presented to the jury, who can place the responsibility where it rightfully belongs, either by holding both liable, or holding one party liable and acquitting the other.

An act wrongfully done by the joint agency or co-operation of several persons will render them liable jointly or severally. The injury done in this case resulted from a collision caused by the contemporaneous act of two separate wrong-doers, who though not acting in concert, yet by their simultaneous wrongful acts put in motion the agencies which together caused a single injury ; and for this the injured party could receive but a single compensation. "It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and if by many, whether they acted with a common purpose and design in which they all shared, or from separate and distinct motive, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover." *Stone v. Dickinson*, 5 Allen, 31.

In *Colegrove v. New York, etc., R. R.*, 20 N. Y. 492, it was held that a passenger, injured by a collision resulting from the concurrent negligence of two railroad corporations, could maintain a joint action against both. *Cooper v. E. T. Co.*, 75 N. Y. 116, was a case where death had resulted from a collision by two vessels, and an action against both jointly was maintained. In my opinion this action may be maintained against the owner of both vessels. *Hillman v. Newington* 57 Cal. 56 :

[Minor question omitted.]

As we have thus passed upon all the material questions raised, and are of opinion that the court erred upon the questions designated, the judgment will be reversed with costs and a new trial ordered.

The other justice concurred.

Goodsell v. Seeley.

GOODSELL V. SEELEY.

(46 Mich. 622.)

Jury — constraint of, by judge — splitting difference.

A jury came into court and reported that they could not agree, and "stood eleven to one and divided on \$200." The judge told them it would be better for one or both sides to yield, and that a disagreement over so small a matter would be unfortunate. *Held*, error.

CASE. The opinion states the case. The plaintiff had judgment below.

Crocker & Hutchins, for plaintiff in error.

J. B. Eldridge, for defendant in error.

COOLEY, J. The defendant in error, an infant, brought suit against Goodsell, who is a physician, for malpractice in setting her arm. Goodsell had treated the injury as a fracture of the humerus, but after two or three weeks it was discovered that there was a dislocation at the elbow, and another physician was called in, by whom the dislocation was properly treated. There was a fair question on the evidence whether Goodsell had been laboring under any mistake in his treatment; whether the fracture for which he treated the child had not existed in fact, and whether the child had not caused the dislocation by engaging in rough and violent sports while her arm was progressing favorably under the physician's treatment. The jury however found against him, and he brings error.

[Omitting other questions.]

The judge however did commit an error subsequent to the charge, of which the plaintiff in error is at liberty to take advantage. The record states that after the jury had been absent for a time they came in and stated "they had not agreed, but stood eleven to one and divided on \$200." The judge in reply told them: "If that is the only difference it would be better for the county and the parties on both sides that one or both sides yield so as to come together. . It would be unfortunate for all to have a disagreement when the difference is so small," and he asked them to get together if possible.

It is no doubt true that juries often compromise in the way here

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suggested, and that by "splitting difference," they sometimes return verdicts with which the judgment of no one of them is satisfied. But it is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to convert it into a lottery. It was no doubt very desirable to the public and to the parties that the jurors should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties ; but not otherwise.

The judgment must be reversed, with costs, and a new trial ordered. The condition of the record is such that we feel warranted in directing that in taxing the costs, only one-half the cost of printing the record shall be allowed.

Judgment reaffirmed.

The other justices concurred.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

WORDEN V. NEW BEDFORD.

(181 Mass. 22.)

Municipal corporation — negligence — dangerous premises — servant.

If a city lets rooms in a public building with the services of a janitor, it is responsible for a personal injury caused by his negligence in the care of the building to one lawfully there by invitation of the hirer.*

TORT for personal injury by falling through a trap-door in a public hall belonging to defendant. The opinion states facts. The plaintiff had judgment below.

F. A. Milliken, for defendant.

E. L. Barney, for plaintiff.

MORTON, J. Under the instructions given them, the jury must have found that the city of New Bedford was the owner of a building known as the city hall, used for the ordinary municipal purposes; that it had been accustomed to let it, for profit, for

*See *Moulton v. Scarborough* (71 Me. 257), 83 Am. Rep. 308.

lectures, exhibitions, amusements and other like purposes having no relation to municipal affairs or interests; that at the time the injury happened to the plaintiff it had, acting by its committee on public property, let the hall and a smaller room adjoining, for profit, to the Southern Massachusetts Poultry Association; that the sum paid by the association included compensation for the lighting and heating the rooms and for the services of the janitor, who, by appointment of the city, had the care of the building; that the plaintiff was injured solely by the carelessness of the janitor, while doing acts in the lighting and heating of the rooms; and that the plaintiff was rightfully in the rooms and using due care when he received the injury. These facts are sufficient to establish the liability of the city.

A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation.

But when a city or town does not devote such building exclusively to municipal uses, but lets it, or a part of it, for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be. *Oliver v. Worcester*, 102 Mass. 489; s. c., 3 Am. Rep. 485; *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332.

But the defendant contends that a city or town has no power to let its public buildings for private uses, that the letting to the poultry association, if made by the city, was *ultra vires*, and therefore it is not liable. This ground is untenable. The city could not erect buildings for business or speculative purposes, but having a city hall, built in good faith and used for municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for a compensation. Such a use is within its legal authority, and is common in most of our cities and towns. *French v. Quincy*, 3 Allen, 9.

The defendant also contends that the act of the committee on public property in letting the hall was unauthorized, and did not bind the city. The by-laws of the city provide that "this committee

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shall have the care and custody of all buildings belonging to the city, and of the erection, alteration and repairs thereof, excepting as otherwise provided, and subject to such rules, orders, and regulations as the city council may adopt." No vote of the city council authorizing its committee to let the hall was shown ; but it appeared, and was not disputed, that the city had for a series of years previously to the plaintiff's injury let the hall for similar purposes for profit, and that the money received had been paid into the treasury of the city. This evidence was sufficient to prove the authority of the committee to let to the poultry association.

The defendant further contended that the janitor, by whose negligence the plaintiff was injured, was not the agent of the city, but of the poultry association. By the terms of the contract with the association, it was to pay the sum of \$40 as rent, and "this sum included compensation for the use of the rooms let, for heating and lighting, and the services of a janitor furnished by the city." This imports a stipulation by the city that it would heat and light the rooms, and for this purpose would furnish the janitor as its agent. In performing the duty of lighting and heating the rooms, the janitor was acting as the agent of the city. If an individual owning a hall should let it upon a similar contract, assuming the duty of lighting and heating it, he would be ultimately liable for an injury caused by his negligence in performing this duty. It may be that the tenant, from his relation to the public which he invites to enter the hall, might be liable to a person injured, but if so, he would have recourse over against the owner, by whose negligence the injury was caused. The liability is the same against the city, if the plaintiff was injured by the negligence of an agent acting for it in the performance of a duty undertaken by it for profit.

We are therefore of opinion, that upon the facts proved in this case the defendant was liable ; it was dealing with the city hall, not in the discharge of a public duty, but for its own benefit and gain in a private enterprise, in the same way as a private owner might, and was liable for negligence in the management of the property to the same extent as such private owner would be.

Exceptions overruled.

Harris v. Carmody.

HARRIS v. CARMODY.

(181 Mass. 51.)

Duress — threat of imprisonment of son.

A father may avoid a mortgage which he was induced to execute by threats of the prosecution and imprisonment of his son. (*See note, p. 190.*)

ACTION to recover land. The opinion states the case. The defendant had judgment below.

W. D. Northend & E. F. Stone, for plaintiff.

P. O'Loughlin & J. M. Raymond, for defendants.

MORTON, J. At the trial, the evidence tended to show that the plaintiff sued the male defendant upon several promissory notes purporting to have been indorsed by him ; that the defendant set up in that suit that the notes were not indorsed by him, but his pretended signatures were forged by his son ; and that a settlement of that suit was made, under which the defendant gave his note for one thousand dollars, secured by a mortgage of real estate.

In the case at bar the defendant seeks to avoid this mortgage upon the ground that he was induced to execute it by duress. The evidence tended to show that he was induced to execute it by threats of the prosecution and imprisonment of his son. The court instructed the jury as to what would constitute duress, without objection being taken ; and then ruled in substance that the defendant could avoid the mortgage by proof of duress to his son. The plaintiff excepted to this ruling, and the first question is as to its correctness.

At common law, as a general rule, the defense of duress *per minas* must be sustained by proof of threats which create a reasonable fear of loss of life, or of great bodily harm, or of imprisonment, of the person to whom the threats are made, and one man cannot avoid his obligation by reason of duress to another. There is a well-settled exception to this rule in the case of husband and wife, all the authorities agreeing that each may avoid a contract if it was made to relieve the other from duress. *Shep. Touchst.* 61 ; *Met. Cont.* 28, and note ; *Robinson v. Gould*, 11 Oush. 55, and cases cited.

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The question whether this exception extends to the relation of parent and child does not appear to have been expressly adjudicated. But we find many *dicta* of judges and statements of authors, entitled to great respect, which show that from the earliest times it has been considered as the settled law that the relation of parent and child was within the exception.

In a note to *Bayly v. Clare*, 2 Brownl. 275, 276, in the Common Bench, Michaelmas term 7 Jac. 1, it is said that "the husband may avoid the deed that he hath sealed by the duress of imprisonment of his wife or son, but not of his servant." This is evidently the same case stated by Sergeant Rolle in his Abridgment, as follows: "A servant shall not avoid his deed made by duress to his master. M. 7, Ja. B. per Coke. But a son shall avoid his deed by duress to his father. M. 7, Ja. B. 2, per Coke. The husband shall avoid a deed by duress to his wife. M. 7, Ja. B. per Coke." 1 Rol. Abr. 687, pla. 4-6.

Lord Bacon, under the maxim, *Persona conjuncta æquiparatur interesse proprio*, wrote "so if a man menace me, that he will imprison or hurt in body my father or my child except I make unto him an obligation, I shall avoid this duress, as well as if the duress had been to mine own person." Bac. Max. *reg.* 18.

The same law is explicitly laid down without question by the author of Bacon's Abridgment and by Mr. Dane and by Mr Justice McLEAN. Bac. Abr. Duress, B; 5 Dane Abr. 166, 375; *McClintick v. Cummins*, 3 McLean, 158, 159.

In *Wayne v. Sands*, 1 Freem. 351, the point decided was that a plea, that one Robinson was jointly bound with the defendant, and that Robinson entered into the contract by duress, was bad. The reporter attributes to WYLDE, J., the remark that "if the duress be to a father or brother, and a son enter into bond, this is a duress to the son," and to TWISDEN, J., the remark that "a man shall in no case avoid his deed by a duress to another, let him be related how he will." The case is too imperfectly reported to be of great weight, and it is to be observed that the remark attributed to TWISDEN, J., would exclude the case of husband and wife, in opposition to all the authorities. In the report of the same case, under the name of *Warn v. Sandown*, in 3 Keb. 238, it is said that there was "*per curiam* judgment for the plaintiff; this Roberts being no father, husband, wife nor near relation, in which cases the bond would be void."

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We are not referred to any modern authorities opposed to the views of the learned judges and authors whom we have cited. The exception in favor of husband and wife is not based solely upon the legal fiction that they are in law one person, but rather upon the nearness and tenderness of the relation. The substantial reasons for the exception apply as strongly to the case of a parent and child as to that of a husband and wife. No more powerful and constraining force can be brought to bear upon a man, to overcome his will and extort from him an obligation, than threats of great injury to his child. Both upon reason and upon the weight of the authorities we are of opinion that a parent may avoid his obligation by duress to his child, and therefore that the ruling of the Superior Court upon this point was correct.

Exceptions overruled.

NOTE BY THE REPORTER.—A similar decision was made by the House of Lords, in *Williams v. Bayley*, 14 L. T. Rep. (N. S.) 802, but the decision was mainly put on the ground that the agreement was for stifling a prosecution, and therefore void. But Lord Wensley said: "The only motive to induce him to adopt the debt was the hope that by so doing he would relieve his son from the inevitable consequences of his crime. The question therefore, my lords, is, whether a father, appealed to under such circumstances, with the knowledge that unless he does so, his son will be exposed to a criminal prosecution, with the certainty of a conviction, can be regarded as a free and voluntary agent. I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is above all things a contract which should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father when he is brought into the situation of either refusing and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation. I have therefore, my lords, in that view of the case, no difficulty in saying, that as far as my opinion is concerned, the security given for the debt of the son by the father, under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must undoubtedly be considered as necessary to validate a transaction of such a description."

The same doctrine was approved, *obiter*, in *Seear v. Cohen*, 45 L. T. Rep. (N. S.) 589.

In *Jordan v. Elliott*, Pennsylvania Supreme Court, March, 1882, the plaintiff sued on a judgment note obtained by him from the defendant, a widow seventy-seven years old, upon threats of prosecuting her son, to whom the plaintiff had lent the sums for which the note was given (over \$7,000), and who had become insolvent. It appeared in evidence that the plaintiff strode up and down with fierce gesticulations and tragical mutterings, thrust his fist in the face of the insolvent son, who sought to interfere, and vowed with uplifted hand to prosecute him unless the matter was settled, until finally "the girls began to cry" and the old lady "ready through terror, as she says, to do any thing to put an end to this frightful scene," signed the note. The court in affirming a verdict for the defendant said: "We are free to admit, that to a man of ordinary courage, this fuss and fume of Jordan might have been regarded as a mere farce, and would probably have been productive of a consequence no more serious than a summary and uncereemonious ejection of the intruder from the premises. But to this old lady, helpless as she was, and unprepared either to encounter or deal with such sham heroics, the matter was altogether

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different, and the jury were justified in believing that she was much frightened, and that her will was so controlled thereby that the obligation which she signed was not her free and voluntary act. We are aware that neither under the rule of the civil nor common law, as formerly expressed, would there be sufficient to release Mrs. Elliott from her contract. But * * * we think the opinion of Mr. Evans expresses the doctrine which is now approved by the judicial mind, both of this country and of England, that any contract produced by actual intimidation ought to be held void, whether arising from a result of merely personal infirmity, or from circumstances which might produce a like effect upon persons of ordinary firmness."

See *Coffman v. Lookout Bank*, 5 Lea, 232; s. c., 40 Am. Rep. 81.

CHURCHILL v. HOLT.

(121 Mass. 67.)

Negligence — contribution — in pari delicto.

If a person maintains a hatchway in his sidewalk unsafe for travellers, and another takes and leaves the cover off, and a traveller being injured thereby recovers damages against the occupant, the latter cannot recover indemnity of the intermeddler.

TORT to recover the amount of a judgment, paid by plaintiff, recovered by Mrs. Meston against plaintiff for personal injuries caused by falling into an open hatchway on plaintiff's premises. The opinion states the facts. The defendant had judgment below.

J. O. Teale (C. R. Train with him), for plaintiffs.

A. A. Ranney, for defendants.

MORTON, J. This case came before us at the former hearing upon an offer of proof made by the plaintiffs; and it was held that the case should have been submitted to the jury, because the evidence offered tended to show that on the day of the accident, the plaintiffs left the hatchway in a safe condition, and the servant of the defendants negligently removed the cover, and thus made it dangerous, without the knowledge of the plaintiffs. It was adjudged that if such were the facts, the parties were not joint tortfeasors, *in pari delicto*, and the plaintiffs could maintain an action for indemnity. *Churchill v. Holt*, 127 Mass. 165; s. c., 34 Am. Rep. 355. At the second trial, the facts were disputed. The principal

question was whether the parties were joint tortfeasors, within the rule of law which precludes those who are *in pari delicto* from recovering of each other indemnity or contribution. The evidence was conflicting. The bill of exceptions states that "the presiding justice gave instructions intended to cover all the points raised by either party, to which no exception was taken except as follows: The jury were instructed that if the plaintiffs left the hatchway in a condition that was reasonably safe, and the defendants' servant removed the covering in the performance of the defendants' business, so that the injury to Mrs. Meston was caused by that means, the plaintiffs are entitled to recover; but if the hatchway as left by the plaintiffs was in an unsafe condition, so that an injury to Mrs. Meston was liable to happen in consequence of it, and the defendants' servant, in the course of the business of the defendants, so interfered with the hatchway as to cause it to be more dangerous, and Mrs. Meston was injured in the way thus made more dangerous, the plaintiffs could not recover. To this instruction the counsel for the plaintiffs duly objected."

The first clause of these instructions was in accordance with the previous decision in this case, and the plaintiffs do not object to it. The second clause, fairly construed, means that if the plaintiffs left the hatchway in an unsafe condition, so that the same injury or an injury of the same character was liable to happen to Mrs. Meston in consequence of it, and if the defendants' servant, in the course of their business, interfered with it so as to make it more dangerous, that is, to increase the danger already existing by the fault of the plaintiffs, and Mrs. Meston was injured in the hatchway thus made more dangerous, the plaintiffs cannot recover. We cannot doubt that it was so intended, and so understood by the jury. Thus construed it is not open to exception, because in the case which it supposes the fault of the plaintiffs was a contributing cause of the injury. In such a case, both parties, whether they act with a common purpose or independently, aid in creating the danger or nuisance, and it is impossible to apportion the degree of their respective negligence, or to determine by whose individual negligence the injury was caused. They are both wrong-doers, whose unlawful acts contribute to produce the injury. They are *in pari delicto*, and therefore neither can recover indemnity or contribution of the other. The plaintiffs contend that they had the right to go to the jury upon the question whether the sole cause of

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the injury to Mrs. Meston were the negligent acts of the defendants' servant.

We must presume that proper instructions were given as to other aspects of the case; but in the aspect of the case supposed in the instruction we are considering, that is, if the jury found that the plaintiffs negligently left the hatchway in a dangerous condition, and that the acts of the defendants' servant merely made it more dangerous, it is impossible for the jury to find that the fault of the plaintiffs did not contribute to the injury. It is like the case of a man injured by falling into a hole dug partly by one person and partly by another. The acts of both aid in creating the danger which causes the injury, and it cannot be ascertained whether the acts of one excluding the acts of the other would have caused the same injury. If the acts are unlawful, both are wrong-doers *in pari delicto*, and though each would be liable to the person injured, neither could recover indemnity or contribution of the other.

Exceptions overruled.

CAMBRIDGE SAVINGS BANK v. HYDE.

(181 Mass. 77.)

Negotiable instrument — alteration — memorandum on back.

A memorandum made on the back of a note, by the holder, in pursuance of an agreement with the maker, but without the knowledge of a surety, to the effect that the rate of interest after a specified day will be less than that provided in the note, is not an alteration, and does not discharge the surety.

ACTION on a promissory note. The opinion states the case.

M. F. Dickinson, Jr., & H. R. Bailey, for defendants.

G. S. Hale and C. F. Walcott, for plaintiff.

MORTON, J. This is a suit against the executors of one of the sureties upon a promissory note held by the plaintiff. By the note, which is dated October 16, 1871, the maker promises to pay to the plaintiff \$6,000 on demand, with interest at the rate of seven and one-half per cent per annum, payable semi-annually. At the trial,

it appeared that the treasurer of the plaintiff, some years after the date of the note, having authority to do so, wrote upon the back of the note the memorandum, "Rate of interest to be 6 1-2 per cent from Oct. 10, 1876." The defendants asked the court to rule "that any change in the rate of interest of the note, whether made on the face of the note or by a memorandum in the margin or upon the back of the note, was a change in the terms of the contract, and a material alteration of the note such as would discharge the defendants' testator, if made without his consent, and that the indorsement upon the back of the note in suit was such an alteration;" which ruling the court refused.

The defendants contend, in the first place, that this memorandum thus made was a material alteration, in the sense of a mutilation of the note, which avoided it as to all parties not consenting to it. In the cases where it has been held that a material alteration of a note or other contract avoids it, there has been some change by erasure or interlineation in the paper writing constituting the evidence of the contract, so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground of the decisions is that the identity of the contract is destroyed. *Wade v. Willington*, 1 Allen, 561; *Commonwealth v. Emigrant Savings Bank*, 98 Mass. 12; *Belknap v. National Bank of North America*, 100 id. 376; *Hewins v. Cargill*, 67 Maine, 554. But in the case at bar it is clear, that using the word in this sense, there has been no alteration of the note. The original note remains intact. It is in no respect altered or made different. The memorandum on the back is evidence of an independent collateral agreement, and has no more effect than if it had been written on a separate paper. *Stone v. While*, 8 Gray, 589.

The defendants also contend that, if the memorandum is to be treated as an independent collateral agreement, yet it makes such a change in the terms of the contract as to discharge the sureties, who did not consent to it. It is clear that if a creditor makes any agreement with the principal debtor, or does any other act which is prejudicial to the rights of the surety, the surety is discharged from his liability. Thus if the creditor, by a valid agreement founded upon a sufficient consideration, extends the time of payment of the debt, the surety is discharged. The reason is, that such an agreement materially affects the rights of the surety, since it prevents him from paying the debt and having an immediate

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remedy against the principal debtor. *Hunt v. Bridgham*, 2 Pick. 581 (13 Am. Dec. 458); *Agricultural Bank v. Bishop*, 6 Gray, 317. Mr. Justice STORY states the rule to be, "that if a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged." 1 Story Eq. Jur., § 325. The surety is discharged because the act of the creditor is injurious to him and is inconsistent with the duty which the creditor owes to him. Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the true rule is, that if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice him, the surety is not discharged. *Smith v. United States*, 2 Wall. 219; *Appleton v. Parker*, 15 Gray, 173; *General Steam Navigation Co. v. Rolt*, 6 C. B. (N. S.) 550; *Bowmaker v. Moore*, 7 Price, 223; *Holme v. Brunskill*, 3 Q. B. D. 495.

In the case at bar, the new agreement was, that after a day named, the interest on the principal sum lent by the plaintiff should be at the rate of six and a half instead of seven and a half per cent. It was clearly not the intention of the parties to discharge the note and substitute a new contract in its place. The agreement presupposes that the note is to remain in force as a promise to pay the principal debt. The parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only to remit a portion of the interest payable under it for the use of the money. We know of no rule of law which requires us to defeat the intention of the parties by holding that this operated to discharge the original contract in whole. It is also clear that the change in the original contract, by reducing the rate of interest, could not be prejudicial to the sureties. It is to be borne in mind that there was no contract by the plaintiff giving time to the principal debtor, and no contract by the debtor that the amount of the note should remain on interest at the new rate for any time. The plaintiff could at any time have sued on the note, and the sureties could at any time have paid the note and have had a right to sue their principal at once. The agreement was merely a stipula-

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tion to remit a part of the sum which the plaintiff might claim under the note. It did not tie the hands of the creditor, or alter unfavorably the condition of the surety. If there was any consideration for it, so that it had any validity, it could not operate to the injury of the sureties, any more than an indorsement of, or a receipt for, a part of the principal would. The change made in the terms of the note was necessarily beneficial to all parties bound by it. We are of opinion that the sureties were not discharged, even if they had no knowledge of the change ; and that the ruling of the Superior Court to that effect was correct.

Judgment on the verdict for the plaintiff.

WATERTOWN FIRE INSURANCE COMPANY V. SIMMONS.

(181 Mass. 85.)

Surety — for faithful performance — laches of principal.

An insurance agent gave bond for faithful performance according to the company's by-laws. A by-law required monthly accounting and paying over. He accounted regularly, but one month neglected to pay over the whole balance due, and after that his indebtedness increased, without notification to the sureties, until it exceeded the penal sum. *Held*, that the sureties were not discharged.*

ACTION on a bond. The opinion states the case. The plaintiff had judgment below.

C. Allen & J. Fox, for defendants.

G. A. Torrey, for plaintiff.

MORTON, J. This is an action against the defendants as sureties upon a bond given by George L. Dix, conditioned for the faithful performance of his duties as agent for the plaintiff, "according to the by-laws, rules and regulations of said company."

One of the by-laws of the company required that the agents should render monthly accounts, and should pay each month the balance due to the company. It appeared that Dix rendered his

* See *Home Ins. Co. v. Holway* (55 Iowa, 571), 39 Am. Rep. 172.

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monthly accounts regularly, but that in December, 1877, he failed to pay the whole balance due by him ; and that thereafter his indebtedness to the company increased from month to month until his death in March, 1879, when he owed a balance larger than the penal sum of the bond. The plaintiff did not notify the sureties of his default until after his death. The defendants contend that they were discharged from their liability as sureties by these facts.

It is too well settled to be questioned, that the delay of the plaintiff to collect the monthly payments due by Dix would not of itself discharge the sureties. Mere delay by the creditor to proceed against the debtor, unaccompanied by fraud or an agreement to give time, does not discharge the sureties. *Hunt v. Bridgham*, 2 Pick. 581 (13 Am. Dec. 458). The defendants contend that the by-law, being referred to in the bond, " amounts to a contract between the plaintiff and the sureties that the plaintiff will not knowingly permit the agent to depart from the duty there recited." The sole object of the bond was to secure the performance by Dix of his duties under the by-laws, and they are referred to only for the purpose of defining these duties. They cannot be construed as importing a stipulation with the sureties that the plaintiff shall cause them to be observed and kept under the penalty of discharging the sureties. Such by-laws are directory merely and a failure to observe them by the plaintiff or its managing officers will not discharge the sureties. *Amherst Bank v. Root*, 2 Met. 522 ; *Locke v. United States*, 3 Mason, 446.

But the principal ground of defense is that it was the duty of the plaintiff, within a reasonable time, to notify the sureties of any default of the agent, and that the failure to do so was laches which discharged them. It may be questioned, whether, if there was negligence of the other officers or agents amounting to laches, the corporation would be affected by it, as the object of the bond was to give the stockholders the double security of the supervision of its officers and the obligation of the sureties. *Amherst Bank v. Root*, *ubi supra*. But treating this case as if it were the case of an individual obligee, we are of opinion that there is no rule of law which makes it a duty which the creditor, under the circumstances of this case, owes to the surety, either to dismiss its agent or to notify the surety of his default. If a creditor does any act which injuriously affects the situation and rights of the surety, such as giving time to the debtor, or relinquishing security which he holds

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for the debt, he discharges the surety either in whole or *pro tanto*. But the creditor owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor. *Wright v. Simpson*, 6 Ves. 714 ; *Adams Bank v. Anthony*, 18 Pick. 238 ; *Taft v. Gifford*, 13 Met. 187 ; *Tapley v. Martin*, 116 Mass. 275. The surety is bound to inquire for himself ; and cannot complain that the creditor does not notify him of the state of the accounts between him and his agent, for whom the surety is liable. Mere inaction of the creditor will not discharge the surety unless it amounts to fraud or concealment.

The defendants rely upon the cases of *Phillips v. Foxall*, L. R., 7 Q. B. 666; *Enright v. Falvey*, 4 L. R., Ir. 397, and *Sanderson v. Aston*, L. R., 8 Ex. 73. In the first two cases, it was held that in the case of a continuing guaranty for the honesty of a servant, if the master discovers acts of dishonesty in the servant and afterward continues him in his service without notice to the sureties, the latter are discharged. We have no occasion to discuss these cases further than to say that they have no application to the case before us, because it is not contended that the agent, Dix, for whom the defendants were bound, was guilty of any defalcations or other dishonest or fraudulent conduct. In *Sanderson v. Aston*, the declaration was on a bond guaranteeing that one J., a clerk of the plaintiff, should pay over all money he received on the plaintiff's account ; the plea was, that before the defaults sued for, J. had committed other defaults of the same kind, and the plaintiff, knowing this, continued to employ him without notice to the defendant. On demurrer, this plea was held good. Chief Baron KELLY, in delivering his opinion, says, "the case of *Phillips v. Foxall* clearly shows, that if any defaults or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him." This decision does not seem to be sustained by *Phillips v. Foxall*, which was a case of criminal embezzlement by the servant, and we are not aware of any other decisions sustaining it, at least in this country. Its effect would be to impose upon the creditors the duty of notifying the sureties whenever there are any arrears in the accounts of the agent or servant for whom they were bound, from whatever cause arising. We do not think that

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any such active duty of diligence to protect the sureties grows out of the relations of the parties, and are not able to agree with the decision in *Sanderson v. Aston*, regarding it as in conflict with the general current of authorities.

This question was considered in *Atlantic & Pacific Telegraph Co. v. Barnes*, 64 N. Y. 385 ; s. c., 21 Am. Rep. 621 ; and it was held that continuing an agent in service after a default is known, without notice to the surety, does not discharge him, no fraud or dishonesty being shown. See also *McKecknie v. Ward*, 58 N. Y. 541 ; s. c., 17 Am. Rep. 281.

Upon the whole case therefore we are of opinion that upon the facts stated in the bill of exceptions, the sureties were not discharged ; and that the Superior Court rightly found for the plaintiff.

Exceptions overruled.

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(181 Mass. 98.)

Mortgage — contract by grantee to assume — measure of damages for breach.

The acceptance of a deed covenanting that the premises are free from incumbrances except a mortgage, "which the grantee assumes and agrees to hold the grantor harmless from," binds the grantee to pay the mortgage debt ; and in an action on that agreement after maturity of the mortgage, the grantor may recover the amount due thereon, although he may have paid no part of it.

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

J. F. Colby, for defendant.

L. W. Howes, for plaintiffs.

GRAY, C. J. This is an action of contract. The facts of the case, as found by the chief justice of the Superior Court, before whom it was tried without a jury, are as follows :

On September 20, 1873, the plaintiffs, being the owners of a par-

cel of land in Newton, mortgaged it to Margaret Aitken to secure the payment in three years from date of their promissory note to her for \$4,000 ; and on June 12, 1875, conveyed the land to the defendant by a deed, expressed to be "in consideration of six thousand dollars paid by" him, describing the land by metes and bounds, and containing covenants of seisin in fee, good right to sell and convey, freedom from incumbrances "except a mortgage to Margaret Aitken of four thousand dollars, which the grantee assumes and agrees to hold the grantors harmless from," and of warranty against all lawful claims and demands except as aforesaid. The consideration of this deed in fact consisted of \$2,000 paid in money or its equivalent, and of the defendant's promise to pay the note and mortgage for \$4,000.

On August 9, 1877, the defendant conveyed the land to George W. Miller, describing it by metes and bounds, and as being the same premises conveyed to the defendant by the plaintiffs by deed dated June 12, 1875. The deed to Miller was admitted in evidence against the defendant's objection, but was clearly competent to prove that he had accepted the previous deed therein mentioned, and is not shown to have been offered or admitted for any other purpose.

The plaintiffs paid the interest which fell due on the mortgage note before their conveyance to the defendant. The defendant paid some interest falling due after that conveyance, and \$1,500 of the principal sum, and then refused to make any further payments. On July 1, 1878, the land was sold by Aitken under a power of sale in the mortgage, after due notice to the defendant and all other persons interested, for the sum of \$850 ; and this sum (deducting \$45, the expenses of sale), as well as the other sums paid as aforesaid, was applied by Aitken toward the payment of the note.

The plaintiffs in their declaration set forth the facts above stated, and sought to recover the amount remaining due upon the note. They have never paid any part of the principal of the note, or of the interest except as above mentioned.

The defendant asked the judge to rule that the language in the deed from the plaintiffs to him did not show a contract on his part to pay the mortgage, but a contract to indemnify the grantors in case they sustained any loss ; and that if they had sustained no loss, they could not recover. But the judge refused so to rule ; and ruled that if the defendant accepted the deed from the plaintiffs to him, and agreed to pay the mortgage note as part of the considera-

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tion of the conveyance, he thereby contracted to pay the amount then due and unpaid on the note, and the plaintiffs were entitled to recover in this action a sum of money equal to that amount ; and ordered judgment for the plaintiffs for the amount claimed and interest ; and the defendant alleged exceptions.

The case, having been submitted on briefs, has been considered by all the judges. The plaintiffs, in support of their action, rely upon the decision in *Furnas v. Durgin*, 119 Mass. 500 ; s. c., 20 Am. Rep. 341. The defendant contends that that case is distinguishable from this ; in other cases which have come up while this has been under advisement, it has been argued that the decision in *Furnas v. Durgin* is erroneous in principle ; and the court, after much consideration, is not unanimous. It is therefore proper to state somewhat fully the grounds and authorities upon which that decision rests.

By the common law, where the condition of an obligation was merely to indemnify and save harmless, the defendant might plead *non damnificatus* ; but where the condition was to discharge or acquit the plaintiff from such and such a bond, or other particular thing, the plea must aver performance, and a plea of *non damnificatus* was bad. 1 Saund. 116, note.

Although a surety, whose rights against his principal rest only upon the liability implied by law from the relation between them, can maintain no action against his principal until he has himself paid the debt for which they are both liable to their creditor, yet as long ago as 1797, it was determined, by concurrent decisions of the Courts of King's Bench and Common Pleas, that if a surety on a bond for the payment of money at a certain day took a bond from his principal to pay the money, according to the terms of the first bond, to the obligee therein, and to indemnify and save harmless the surety against his liability on that bond, the surety, on the failure of the principal to pay the money on the day when it became due and payable by the first bond, might maintain an action against him on the second bond without having himself paid the money. *Hodgson v. Bell*, 7 T. R. 97 ; *Holmes v. Rhodes*, 1 B & P. 638. And it was afterward held by Lord TENTERDEN and Mr. Justice BAYLEY that where a man made a bond, reciting that certain land of the obligee was charged with the payment of an annuity which the obligee had engaged to pay, and conditioned that the obligor should pay the annuity and indemnify the obligee from the

same, the obligee was entitled, in action on the bond, to recover the amount of due and unpaid installments of the annuity without proving that he had paid them. *Penny v. Foy*, 8 B. & C. 11 : s. c., 2 Man. & Ryl. 181.

So where two persons being jointly indebted on a promissory note, the one as principal and the other as surety, the principal covenanted with the surety to pay the amount of the note to the payees on a given day, but made default, and was sued upon his covenant, it was ruled by Lord ABINGER at *nisi prius*, and held by Barons PARKE, ALDERSON, GURNEY and ROLFE in banc, that the plaintiff was entitled to recover the whole amount, although the note had not been paid ; notwithstanding the argument of Erle for the defendant, that the plaintiff had suffered no substantial injury, and was entitled to nominal damages only, and that there was nothing to prevent the payees of the note from suing the defendant, in which case he would have to pay the money twice over. Baron PARKE said : " This is an absolute and positive covenant by the defendant to pay a sum of money on a day certain. The money was not paid on that day, nor has it been paid since. Under these circumstances, I think the jury were warranted in giving the plaintiff the full amount of the money due upon the covenant. If any money had been paid in respect of the note since the day fixed for the payment, that would relieve the plaintiff *pro tanto* from his responsibility. The defendant may perhaps have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt ; but at law the plaintiff is entitled to be placed in the same situation under this agreement as if he had paid the money to the payees of the bill." *Loosemore v. Radford*, 9 M. & W. 657.

In *Robinson v. Robinson*, 24 L. T. Rep. 112, by an indenture of dissolution of a partnership between the plaintiff and defendant, the defendant, to whom all the partnership property was transferred, covenanted to pay and satisfy within eighteen months all the debts of the partnership (a schedule of which was annexed to the indenture), and also to indemnify and save harmless the plaintiff against all costs, losses, charges, damages, claims and demands which he might incur or become liable to in respect of the partnership debts. In an action on the defendant's covenant to pay the debts of the partnership, Lord CAMPBELL and Justices WIGHTMAN and ERLE held that the measure of damages was the whole amount of the debts which he had not paid, whether they had been

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paid by the plaintiff or he had given promissory notes for them or not.

Like decisions have been made in New York, Connecticut and Illinois. *In re Negus*, 7 Wend. 499; *Lathrop v. Atwood*, 21 Conn. 117; *Redfield v. Haight*, 27 id. 31; *Gage v. Lewis*, 68 Ill. 604.

In *Robinson v. Robinson*, Lord CAMPBELL said: "There is an absolute covenant by the defendant to pay on a day certain, which covenant he has broken, and the plaintiff has been called upon to pay the debt. If the plaintiff had paid the whole in promissory notes, could he not have maintained an action at all during the currency of the notes? He certainly could for the breach of covenant. Then what is the measure of damages? No other can be suggested than the amount of the debt, including that for which promissory notes have been given. It is clear that the plaintiff could bring no fresh action for this same breach of covenant when he had paid the promissory notes; and if he cannot recover the amount in this action he cannot be indemnified. It is true that the defendant incurs the peril of having to pay twice; but that arises from his own default in not performing his covenant. So the case stands upon reason; and there is a superfluity of authority on the same side. The case of *Loosemore v. Radford* is on all fours with this case." And Mr. Justice ERLE (who had been of counsel in *Loosemore v. Radford*) in his concurring opinion observed that in that case "the point of hardship upon the defendant was fully before the court; because they throw out that the plaintiff would hold the money recovered as trustee for the defendant, who might perhaps have a remedy in equity against any misappropriation of it."

In an earlier case, a man, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off within a year mortgages to the amount of £19,000, but failed to do so, and was sued at law by the trustees upon the covenant. The interest upon the mortgages had been regularly paid, and no special damage was laid or proved. Follett, for the defendant, argued that the intention of the settlement was, that if any of the mortgages should be enforced against the estates, the trustees should have a remedy against the defendant for any injury thereby caused to the objects of the trust, and the damages must be measured by such injury only; that no injury having been sustained, and the estates having been found sufficient to answer the purposes of the trust and to pay the interest, it could not have been intended that the defendant should be compelled to pay off

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incumbrances to this large amount; that if any mortgagee chose to enforce his debt, it did not follow that he would proceed against the estates; and that if the trustees had any claim, they should sue in equity, where justice could be done according to the real merits. But it was held by Lord TENTERDEN and Justices LITLEDALE, PARKE and TAUNTON, that at law the trustees were entitled to recover the whole £19,000, and that it was for the defendant, if he thought fit, to apply to a court of equity. *Lethbridge v. Mylton*, 2 B. & Ad. 772. See also *Carr v. Roberts*, 2 Nev. & Man. 42; s. c., 5 B. & Ad. 78; *Hodgson v. Wood*, 2 H. & C. 649.

Where the assignee of a lessee covenanted in the indenture of assignment to perform all the lessee's covenants in the original lease, one of which was to pay rent, it was held by the old Supreme Court of New York that the lessee could maintain an action against his assignee for rent due and payable under the lease, although he had not himself paid it; and the decision was unanimously affirmed in the Court of Errors, upon the opinion of Chancellor KENT, who said: "We should pervert the plain sense and language of the covenant entered into by Jackson, if we should turn it into a mere covenant to indemnify Port, when it was evidently a covenant to pay the rent for and instead of Port. Port was not bound to go and pay the rent, or have it recovered from him by due course of law, before he could resort to Jackson. He was not bound to subject himself to such previous distress or inconvenience. Jackson had undertaken to keep his covenant for him, that is, to go and pay the rent as it from time to time became due. If Jackson suffers the rent to be previously collected from Port, that would surely not be keeping and performing Port's covenant, as he had engaged to do. I cannot raise a doubt in my mind as to the construction of the covenant." *Port v. Jackson*, 17 Johns. 239, 479, 482.

In *Thomas v. Allen*, 1 Hill (N. Y.), 145, a declaration in debt on a bond executed by the grantee to the grantor of land, contemporaneously with the deed, with condition to pay to the plaintiff \$800 by satisfying a bond secured by mortgage of the land to a third person, and to save harmless the plaintiff therefrom, and from all costs and charges that might be occasioned by the delay or nonpayment of the same, alleged as a breach the nonpayment of the sum on the day when the bond and mortgage became due and payable. A demurrer, because the declaration did not show that the plaintiff had been damnified, was overruled, because this was not a mere

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bond of indemnity, but obliged the defendant to pay a sum of money, when it became due, for which the plaintiff was bound to a third person. And in *Churchill v. Hunt*, 3 Denio, 321, which was an action upon a bond to save harmless and indemnify the plaintiffs against their liability as makers of a promissory note to a third person, and to pay that note, it was held that the plaintiffs might recover the whole amount of the note without having paid any thing themselves. To the like effect are *Trinity Church v. Higgins*, 48 N. Y. 532, and *Be'loni v. Freeborn*, 63 id. 383.

In *Stout v. Folger*, 34 Iowa, 71; s. c., 11 Am. Rep. 138, the plaintiff alleged that he and the defendant entered into a contract as follows: "I, E. S. Stout, do hereby sell to John M. Folger all my right, etc., in the hotel known as the Des Moines House, for the consideration of one thousand dollars. In further consideration for said sale, he, the said John M. Folger, hereby agrees to assume in my place and stead, and to save me harmless from all indebtedness contracted by me, and outstanding against said Des Moines House." The declaration further showed that at the date of the contract there was such a debt for a certain sum outstanding, which had since become payable, and which the defendant had not paid. The defendant contended that this agreement was merely to save the plaintiff from harm by reason of his indebtedness, and that until the plaintiff had paid the debt he was not damnified, and could not recover. But it was held that the defendant's agreement was not merely to indemnify the plaintiff, but also to assume the plaintiff's debt in his place and stead, which was equivalent to an absolute undertaking to pay the debt; and that the plaintiff was therefore entitled to recover the whole amount of the debt.

In *Wicker v. Hoppock*, 6 Wall. 94, the defendant, being in occupation of property as assignee of the lessee, in order to avoid the foreclosure of a mortgage promised the mortgagee, that if he would sue the lessee for the amount of rent in arrear, and obtain judgment and cause the property to be sold on execution, the defendant would "bid it off for whatever the judgment and costs might be." The mortgagee sued, recovered judgment and had the property sold accordingly; but the defendant making no bid at the sale, the mortgagee bought the property himself for a nominal sum, and in an action upon the defendant's agreement was held by the Circuit Court of the United States, and by the Supreme Court upon a writ

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of error sued out by the defendant, to be entitled to recover the whole amount of the judgment, without regard to the value of that judgment as against the lessee, or of the property which he had bought at the sale on execution. The Supreme Court said: "If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases, the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case, a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

In *Smith v. Pond*, 11 Gray, 234, it was alleged in the declaration, and found by the jury, that in consideration of the delivery by the plaintiff to the defendant of a deed conveying a tract of land to the Ladies' Collegiate Institute, the defendant promised the plaintiff to pay him the sum of \$50, and also to pay for him to the institute the further sum of \$100, which the plaintiff had before that time subscribed and agreed to pay to that corporation. The bill of exceptions on file sets forth the evidence introduced at the trial, and the rulings requested and given, more fully than the published report, and states that the plaintiff offered evidence tending to prove the agreement declared on; that the \$50 had never been paid by the defendant to the plaintiff; and that the amount of the plaintiff's subscription for \$100 "was in a note signed by the plaintiff and payable to said institute; that since said deed was given the plaintiff had been called upon by said institute to pay said note, and had paid \$10 in money toward the same, and given his note for \$40, and \$50 was thereupon indorsed upon said \$100 note, and there was \$50 of the original note for which the plaintiff had made no provision." The bill of exceptions further shows that, "upon the above evidence, the defendant requested the presiding judge to rule that the plaintiff, if entitled to recover at all, was only entitled to recover the sum of \$60 and interest;" (which would include only the \$50 which the defendant had promised to pay to the plaintiff, and the \$10 which the plaintiff had actually paid in money on account of his subscription); "but he declined so to rule, but ruled, that if the plaintiff was entitled to recover at all, he was entitled to recover the sum of \$150 and in

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terest ; and the jury found a verdict accordingly." The defendant alleged exceptions, which were overruled by this court upon the following grounds : " Whenever for an adequate consideration a person expressly promises to pay the debt of another and to save him harmless therefrom, the failure of the latter to perform his agreement by the payment of the debt when it becomes due gives to the former an immediate right of action, on which he will be entitled to recover the whole amount of the debt, although he has not then paid any part of it. Upon that principle, the ruling of the presiding judge must be sustained. Under the contract between the parties, which the verdict shows was fully proved, the defendant became indebted to the plaintiff in the sum of one hundred and fifty dollars. If he had paid fifty dollars to the plaintiff and one hundred dollars to said institute, as he might and ought to have done, those payments would have fully discharged him from all liability. As he neglected or refused to make the payments according to his promise, the omission constituted a breach of contract, for which it is obvious that the damages to be recovered ought justly to be no less than the full amount of the sum which he had agreed to pay."

In the case at bar, the court is therefore unanimously of opinion that if the defendant, by deed or other writing signed by himself, had promised the plaintiffs to pay the amount of the mortgage to Aitken, the authorities are conclusive that the plaintiffs might have sued him on his agreement, and recovered the whole amount of the mortgage debt, without proving that they had paid it. And in the opinion of the majority of the court the same rule is applicable to this case, for the following reasons :

The fact that the agreement of the defendant is contained, not in a bond, covenant or indenture executed by himself, but in a deed poll made to and accepted by him, affects the mode of declaring only, and not the extent of his liability. By the law of this Commonwealth, affirmed by many decisions, the grantee, by the acceptance of the deed, becomes liable to perform according to its terms any promise or undertaking therein expressed to be made in his behalf, although, not having himself signed the deed, he must while the old forms of action were retained, have been sued in assumpsit, and not in covenant. *Goodwin v. Gilbert*, 9 Mass. 510 ; *Fletcher v. M'Farlane*, 12 id. 43, 47 ; *Phelps v. Townsend*, 8 Pick. 392, 594 ; *Guild v. Leonard*, 18 id. 511 ; *Newell v. Hill*, 2 Met. 180 ; *Pike v. Brown*, 7 Cush. 133 ; *Braman v. Dowse*, 12 id. 227 ; *Jewett*

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v. *Draper*, 6 Allen, 434; *McCabe v. Swap*, 14 id., 188, 192; *Maine v. Cumston*, 98 Mass. 317, 319; *Fenton v. Lord*, 128 id. 466; *Dickason v. Williams*, 129 id. 182, 184; s. c., 37 Am. Rep. 316; *Coolidge v. Smith*, 129 Mass. 554. See also *Rogers v. Eagle Fire Co.*, 9 Wend. 611, 618; *Rawson v. Copland*, 2 Sandf. Ch. 251.

Such a promise is not within the statute of frauds, because it is a promise implied by law from the acceptance of the deed, and because it is a promise to pay the promisee's own debt to another person. *Goodwin v. Gilbert*, and *Pike v. Brown*, above cited; *Alger v. Scoville*, 1 Gray, 391; *Hubon v. Park*, 116 Mass. 541.

In *Goodwin v. Gilbert*, 9 Mass. 510, by an indenture of four parts, Dexter the lessor, and Hamilton, the lessee of an estate, assigned their interests therein to the plaintiffs; and the plaintiffs thereby covenanted to pay to Odiorne the sum of \$12,500 in one year, and another like sum in two years, with interest in trust for the creditors of Dexter. The plaintiffs afterward assigned and conveyed this indenture to the defendants by deed poll, containing an agreement that the defendants should pay these sums and interest to Odiorne in manner above mentioned; and the defendants took possession of the premises. In an action of assumpsit on this agreement, apparently brought after the first sum had become payable and had not been paid, a verdict was taken for the defendants, to be set aside and a verdict entered for the plaintiffs for the sum of \$15,100, if the action could be maintained. It was argued for the defendants that it could not; and that "the obligation of the plaintiffs to Odiorne was a mere liability, which they may never meet, as the creditors of Dexter may receive their demands from some other source, or may release; and thus the plaintiffs would acquire this money for nothing. All the ground of action they can pretend to is for an indemnity; and such action does not lie until the party is damnified." But the court was of opinion, that "as a general rule, where land is conveyed by deed poll, and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain assumpsit for the non-performance of the duties reserved;" and ordered the verdict for the defendants to be set aside, and a verdict entered for the plaintiffs for the sum mentioned in the judge's report, and judgment to be rendered thereon.

In *Pike v. Brown*, 7 Cush. 133, which was a writ of review of an action of assumpsit brought by Brown against Pike, it appeared

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that Brown, by deed poll, expressed to be in consideration of \$4,000, conveyed a house and lot to Pike, described as being subject to a mortgage to secure Brown's note to one Walker for \$2,825, payable in four years with interest, "which said sum is part of the consideration before named, and this deed is on condition that said Pike shall assume and pay said note and the interest thereon, as they severally become due and payable;" that Pike entered under this deed, and held the estate till an installment of interest became due; that he did not pay it, and Brown, being liable for it on his note, was called upon to pay it and did pay it to the mortgagee, and brought this action of assumpsit to recover the money so paid. The court held that the action could be maintained; and Chief Justice SHAW, in delivering judgment, said: "The principle is well settled, that where one, by deed poll, grants land, and conveys any right, title or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment, or perform such duty, and not having sealed the instrument he is not bound by it as a deed; but it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, assumpsit will lie." "Again if we look at the intention of the parties, it seems to us the result is the same. The deed was in form not the conveyance of an equity of redemption, but a conveyance of the estate, though in legal effect it conveyed an equity of redemption. The consideration for the entire estate was \$4,000, of which Brown's mortgage to Walker was a part, which the defendant assumed and undertook to pay, as part of such consideration. Such payment, when made according to such stipulation, would relieve the plaintiff from his personal obligation to Walker and release the estate from the lien upon it. A stipulation to pay my debt, on a valuable consideration moving from me, accepted by me, in place of so much money, is a promise to me, to indemnify me, and to reimburse me, if not complying with his undertaking to pay it, he leaves me liable on my note, which I pay on demand." In that case, as the grantor had paid the amount which he sought to recover, the question of the measure of his damages, if he had not paid it, was not presented nor considered.

In *Braman v. Dowse*, 13 Cush. 227, the defendant had accepted

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from the plaintiff a deed poll, expressed to be in consideration of \$2,700, and containing this clause : “ The same premises being subject to a mortgage of \$1,150.40, which said Dowse is to assume, it being a part of the above consideration.” The mortgage debt was overdue at the date of the deed, and the holder of the mortgage afterward entered to foreclose it. Before the foreclosure was perfected, the plaintiff, without having paid any thing on the mortgage, brought an action of assumpsit upon the defendant’s promise to pay the debt. The judge presiding at the trial ruled that the action could not be maintained, and directed a verdict for the defendant ; and upon exceptions taken by the plaintiff to this ruling, it was argued for the defendant that the contract between the parties was merely one of indemnity, and that the plaintiff, at the time of bringing the action having paid nothing, and not having then lost his equity of redemption, had not been damnified, and therefore had no right of action against the defendant. But this court, Chief Justice SHAW delivering the opinion, sustained the exceptions and ordered a new trial, because the acceptance of a deed poll containing such a clause “ constitutes a contract and promise by the grantee to the grantor ;” and “ when the stipulation is to pay the grantor’s debt to a third person, it is a good promise by the grantee to the grantor, created by law, on which an action will lie. The nature and terms of such contract are determined by the words in which the reservation is made. The words of the present deed are ‘ will assume ’ a certain mortgage described. A reference to that mortgage on record would show that it was a mortgage given as collateral security for the plaintiff’s note for the like amount, payable in three years, but then outstanding and overdue. It was part of the consideration money.” “ The legal obligation undertaken was, if the plaintiff’s note was not then due, to pay it at maturity,” and “ if the note was then due, the contract was to pay it forthwith, or within reasonable time.” “ More than a reasonable time had elapsed for such payment to be made, before this action was brought, and therefore the plaintiff had a good right of action, for the breach of this promise, when this action was commenced ; and the direction of the judge, that it was prematurely commenced, in effect, that no action would lie until the mortgage should be foreclosed, was incorrect in matter of law.” In that case again, the measure of damages was not determined, because the only question before this court was whether the action could be maintained.

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But in *Jewett v. Draper*, 6 Allen, 434, where the plaintiff, to secure the payment of his promissory note, executed a mortgage of land to the defendant, stating it to be subject to three prior mortgages, the amount of which the defendant should assume and pay, and was made part of the consideration of the note, it was held, in an action for a breach of the defendant's undertaking, that he had the burden of proving that he had paid the amount of the prior mortgages according to his agreement, because his agreement was to pay that amount, and was "unlike a covenant against incumbrances or a guaranty, where the plaintiff can recover only nominal damages unless he proves that he has himself removed the incumbrance or paid the debt."

The omission of the deed to state, in so many words, that the amount of the mortgage is part of the consideration, makes no difference in the rights of the parties. Any thing that the grantee is required by the terms of the deed to pay or to do is part of the consideration, whether so described in the deed or not. The court cannot weigh the adequacy of the consideration of the contract into which the parties have entered. And in the case at bar, the evidence shows, and the court below has found, that the amount of the mortgage in fact constituted part of the consideration.

The right of action of the grantor against the grantee for the amount of the mortgage does not depend upon that amount being expressed to be part of the consideration, but upon the terms and extent of the grantee's promise. A statement in the deed, that the mortgage is part of the consideration will not make the grantee liable to a personal action by the grantor, unless the deed contains a promise by the grantee to pay it. *Fiske v. Tolman*, 124 Mass. 254; s. c., 26 Am. Rep. 659. If by the terms of the deed accepted by him, he promises to pay it, he is liable, whether it is described as part of the consideration or not.

The legal effect of a conveyance by deed poll containing such a promise on the part of the grantee is that the grantor (instead of receiving by way of consideration the full value of the estate in money, and covenanting to pay off the mortgage himself) conveys all his own interest in the land, in consideration of receiving in money the value of the equity of redemption, and of the further consideration that the grantee undertakes, as between him and the grantor, to make himself primarily liable for the latter's debt to the mortgagee.

The object of such an agreement may in a general way be said to be to indemnify or protect the grantor against the debt for which he is previously liable. But the manner in which this is to be done is fixed by the terms of the agreement. It is not merely to reimburse him for such damages as he may suffer by being compelled to pay the debt, but it is an agreement by the grantee that he will assume the debt as his own, and that the grantor shall not be called upon to pay it, or be put to any molestation or inconvenience by reason thereof.

To apply the words of Chancellor KENT in *Port v. Jackson*, 17 Johns. 482, varied only so far as to meet the circumstances of the case: "We should pervert the plain sense and language of the agreement entered into by the grantee, if we should turn it into a mere promise to indemnify the grantor, when it was evidently a promise to pay the mortgage debt for and instead of the grantor. The grantor was not bound to go and pay that debt, or have it recovered from him by due course of law, before he could resort to the grantee. He was not bound to subject himself to such previous suit or inconvenience. The grantee had agreed to keep his contract for him, that is, to go and pay the debt as it became due."

The promise of the grantee to pay the amount of the existing mortgage is not indeed a promise to pay to the grantor; the payment is to be made to the mortgagee; but the promisee, the only party to the grantee's promise, or from whom a consideration for that promise moves to the grantee, and the only person therefore who can maintain an action at law against the grantee, upon this promise, is the grantor. *Mellen v. Whipple*, 1 Gray, 317; *Exchange Bank v. Rice*, 107 Mass. 37; s. c., 9 Am. Rep. 1; *Prentice v. Brimhall*, 123 Mass. 291; *Nat. Bank v. Grand Lodge*, 98 U. S. 123; *United States Mortgage Co. v. Hill*, C. O. U. S. Dist. Mass., May term, 1879.

In *Furnas v. Durgin*, 119 Mass. 500; s. c., 20 Am. Rep. 341, the defendant had accepted a deed of conveyance of a parcel of land, therein stated to be "subject to mortgages amounting to \$6,500, which the grantee hereby assumes and agrees to pay;" and it was adjudged, in accordance with the principles and authorities above stated, that after the amount of one of those mortgages had become due and payable and had not been paid by either party, the grantor might maintain an action against the grantee upon his agreement, and recover as damages the amount of the mortgage so

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remaining unpaid. The correctness of that decision has been recognized by this court in later cases. *Valentine v. Wheeler*, 122 Mass. 566, 568 ; s. c., 23 Am. Rep. 404 ; *Fiske v. Tolman*, 124 Mass. 254, 256 ; s. c., 26 Am. Rep. 659 ; *Gaffney v. Hicks*, 124 Mass. 301, 304. See also, *Corbett v. Waterman*, 11 Iowa, 86 ; *Snyder v. Summers*, 1 Lea, 534, 540, by COOPER, J. The only decision having an opposite tendency, that has come to our knowledge, is in the comparatively early case of *Burbank v. Gould*, 15 Me. 118, and appears to have proceeded in part upon the form of the action, which was for money had and received, and in part upon grounds inconsistent with the now well-settled law of this Commonwealth.

The grantee being not only authorized, but required, by the terms of the deed which he has accepted, to pay the debt of the grantor to the mortgagee, payment by the grantee to the mortgagee of the amount of that debt would discharge that debt and the mortgage given to secure it. *Bolton v. Ballard*, 13 Mass. 227 ; *Kilbern v. Robbins*, 8 Allen, 466 ; *McCabe v. Swap*, 14 id. 138. If such payment were made by the grantee at the day fixed, there would be no breach of his promise to the grantor. If it were made afterward, the latter, in action upon that promise, could recover only nominal damages.

If the grantee does not pay *ad diem*, and so breaks his agreement, the fact that he may be also in danger of having the mortgage enforced against his land affords no defense to the action at law by the grantor against him upon his agreement. If he has any equities, by reason of his failure to pay having been caused by accident, mistake or fraud, or any other matter against which a Court of Chancery will grant relief, his remedy must be sought in equity, as for instance, by bill against the mortgagee and the grantor, on which the mortgagee may be ordered to accept payment of the mortgage debt, with proper interest, expenses and costs, and the grantor, upon such payment being made by the grantee, may be restrained from prosecuting his action at law against the latter except for nominal damages.

In accordance with these views, and with the judgment of Baron PARKE in *Loosemore v. Radford*, 9 M. & W. 658, cited in the early part of this opinion, it was said in *Furnas v. Durgin* : "Perhaps in equity, where a proper case for its interference was shown, a remedy would be afforded, that would secure the party paying under such circumstances from having the payment made by him devoted to

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any other object than that which would relieve him or his estate from further responsibility. However this may be, the want of elasticity in the forms of the common law, which does not enable us to make such a decree here as would guard the rights of all parties, should not prevent us from giving to the plaintiff the benefit of the contract which he has made, or compel him to remain subject to the burden of the debt which the defendant has agreed to extinguish." "The defendant may, if he will, perform his agreement and pay the debt at any time before final judgment, and the damages then to be recovered will be nominal only." 119 Mass. 508.

The only differences between *Furnas v. Durgin* and the case at bar are that in the present case it is not in terms stipulated that the defendant shall "pay" as well as "assume" the mortgage; and that it is stipulated that he shall "hold the grantors harmless from" the same. These differences do not affect the result. Under such circumstances, in common understanding and in legal effect, to "assume" a debt is an undertaking to pay it as the proper debt of the party who enters into the undertaking. *Braman v. Dowse*, 12 Cush. 227; *Drury v. Tremont Improvement Co.*, 13 Allen, 168, 171; *United States Mortgage Co. v. Hill*, above cited; *Stout v. Folger*, 34 Iowa, 71; s. c., 11 Am. Rep. 138. And it is well settled, as appears by the cases already referred to, that when the defendant promises to pay a certain debt due from the plaintiff to a third person, the effect of this promise is not restricted, either as to the form of pleading or the rules of evidence, or the measure of damages, by the fact that the defendant by his agreement further promises to indemnify the plaintiff and save him harmless. *Hodgson v. Bell*, *Holmes v. Rhodes*, *Penny v. Foy*, *Robinson v. Robinson*, *Lathrop v. Atwood*, *Gage v. Lewis*, *Carr v. Roberts*, *Hodgson v. Wood*, *Thomas v. Allen*, *Churchill v. Hunt*, *Belloni v. Freeborn* and *Stout v. Folger*, above cited.

Exceptions overruled.

Poland v. Brownell.

POLAND V. BROWNELL.

(131 Mass. 133.)

Fraud — false representations on sale of business — buyer's laches.

One proposing to buy an interest in a business and a stock of goods, having ample opportunity to examine and investigate, may not rely on the seller's representations as to value of the goods or the extent of the business.

PORT for deceit in the sale of an interest in goods and business. The opinion shows the point. The defendant had a verdict.

H. N. Shepard, for appellant.

J. F. Brown and *C. R. Train*, for defendant.

COLT, J. To maintain this action, the plaintiff must prove that he was induced to buy the stock of goods and a share of the business in question by the fraudulent misrepresentation or concealment by the defendant of material facts, and that he suffered damage thereby. He has no cause of action, if having ample opportunity to examine the property, he saw fit to rely upon the statements of the seller concerning the value of the thing sold. It is everywhere understood that such statements and commendations are to be received with great allowance and distrust. *Brown v. Castles*, 11 Cush. 348, 350; *Mooney v. Miller*, 102 Mass. 217; *Parker v. Moulton*, 114 id. 99; s. c., 19 Am. Rep. 315.

The representations relating to the goods sold were made by the defendant himself. The goods were exposed and fully examined by the plaintiff and his friend, who was called in for that purpose before the sale. For all that appears, both buyer and seller had equal means of information and were equally well qualified to judge of the value of the property. The evidence shows that the plaintiff relied on his own examination and the advice of his friend. But what is more decisive, the statements in relation to the goods which were made by the defendant must be deemed to be mere seller's statements, and furnish no ground for an action for damages. *Gordon v. Parmelee*, 2 Allen, 212; *Pike v. Fay*, 101 Mass. 134; *Parker v. Moulton*, 114 id. 99; s. c., 19 Am. Rep. 315.

As to the representation of the defendant, namely, that three of

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them had been getting a living out of the business, it is sufficient to say, that if it can be deemed a material misstatement of fact, yet there is no evidence tending to show that it was false.

The representations alleged to have been made by the defendant's son, to whom the plaintiff was referred for information, do not show a cause of action, because it was not found that they were false, or that they were relied on by the plaintiff. He must be presumed to have known the contents of the books before his purchase. He had been a book-keeper for many years. He had full access to them, and spent all the time he desired to in their examination. He was not excused from making examination of the books, or of the property he was buying, unless he was fraudulently induced to forbear inquiries or examination which he would otherwise have made. And it is well settled, that if fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration. *Parker v. Moulton*, above cited; *Veasey v. Doton*, 3 Allen, 380.

The plaintiff's offer to show what the goods were worth when purchased, and what they afterward sold for at auction, was properly excluded, because such evidence could only be material to show the extent of the injury when occasioned by an actionable wrong on the part of the defendant.

Judgment on the verdict.

BUCHER V. FITCHBURG RAILROAD COMPANY.

(131 Mass. 156.)

Sunday — travelling on — necessity or charity.

A travelling insurance agent, being solicited by letter from his sick sister, temporarily residing in another State, to meet her and carry her home, wrote her to make other arrangements, if possible, and inform him by letter addressed to him at B. He expected to reach B. on a Saturday evening, but missing connections, failed to do so, and took a Sunday train on defendant's road, a fortnight later, to reach B. and get the expected letter. Receiving personal injuries on that train by the defendant's alleged negligence he brought this action. *Held*, not maintainable.

FORT for personal injuries by negligence. The opinion states the facts. The plaintiff had judgment below.

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E. D. Sohler & C. A. Welch, for defendant.*A. A. Ranney*, for plaintiff.

ENDICOTT, J. [Omitting a statutory consideration.] Nor can we hold, upon the facts reported, that there was any evidence which would warrant a jury in finding that the plaintiff was travelling on the 6th of August, which was the Lord's day, from necessity or charity, within the meaning of the Gen. Sts., ch. 84, § 2. It appears from his reported testimony, that he was a travelling agent in New England for a fire insurance company; that his sister was unwell, and was temporarily residing in Minnesota; that on the second week of July she had written to him that she had had a severe attack of illness, and desired to be carried home to Philadelphia. And about July 15 he had written to her, stating his situation, that he was travelling, and asking her to arrange with a friend to bring her as far as Chicago, and that he would make arrangements for some one to accompany her from Chicago to Philadelphia, if her friend could not come with her any farther. To this letter he expected an answer to reach Boston in a week, that is, about July 21, which would decide whether he would have to go after her, or whether her friend would take her home. In his cross-examination, he stated, "When I wrote to my sister, it was to see what arrangement she could make to be brought home that might save me from leaving my field of labor." After writing this letter, he appears to have been absent from Boston, travelling on his insurance business, until Saturday, August 5. He had expected to arrive in Boston that evening, where he was going for his mails and to procure funds, and to attend to his business at the office of the general agent of his company. But he missed a connection of trains, and being desirous to reach Boston, in order that he might receive the expected reply from his sister, he took passage on a freight train of the defendant on the following morning, which was Sunday, and received the injuries complained of. And it is contended that he was travelling from necessity or charity on that day.

The act of the plaintiff in thus travelling on the Lord's day was not an act of necessity within the meaning of the statute. *Connolly v. Boston*, 117 Mass. 64; s. c., 19 Am. Rep. 396; *Jones v. Andover*, 10 Allen, 18; *Commonwealth v. Sampson*, 97 Mass. 407; *Commonwealth v. Josselyn*, id. 411; *McGrath v. Merwin*, 112 id. 467;

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s. c., 17 Am. Rep. 119 ; *Smith v. Boston & Maine Railroad*, 120 Mass. 490 ; s. c. 21 Am. Rep. 538 ; *Davis v. Sommerville*, 128 Mass. 594 ; s. c. 35 Am. Rep. 399.

It remains to be considered whether the travelling was an act of charity. In order to constitute an act of charity, such as is exempted from the Lord's day act, the act which is done must be itself a charitable act. The act of ascertaining whether a charity is needful is not the charity ; but so far as the statute is concerned, the only question in that case would be, Is this act a necessary act ? That involves the question, whether the act is one which is necessary to do on the Lord's day ; and no previous neglect to obtain the requisite information on a previous day creates a necessity for obtaining it on the Lord's day. If it were held otherwise, a man having an important and necessary duty to perform might willfully neglect to perform that duty through the whole week, and conclude to do it on Sunday, because it was an act necessary and proper to be done. In the case at bar, it is not sufficient that it was more convenient for the plaintiff to postpone his travelling to obtain the letter from his sister, in order that he might perform his private business. In *McGrath v. Merwin*, *ubi supra*, the plaintiff was repairing a wheel-pit on the Lord's day, and it was said in the opinion, "The only reason for doing the work on the Lord's day was, that the defendants were doing a large business, employing many hands and 'the work done on the occasion would obviate the necessity of stopping the machinery in future.' The whole import of this is that it was more convenient and profitable to repair the wheel-pit on the Lord's day than it would be to do it on any secular day. This does not make it a work of necessity or charity within the exception of the statute." The same duty, of ascertaining whether an act of charity toward his sister was to be done, had been resting on the plaintiff for two weeks. It would be an extraordinary proposition that he could elect to do an act on Sunday which he could have done equally well on any previous secular day within that fortnight, and which he had postponed because he had considered it subordinate to his secular business. Suppose he had travelled the previous Sunday, in order the sooner to finish his business and reach Boston and obtain this letter, it could not be contended that travelling on the previous Sunday was an act of charity. Or suppose he was under obligation to perform a contract, which it was his duty to complete before going on his charitable journey, and for that reason he per-

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formed secular labor all day Sunday, such labor would be neither necessary nor charitable within the meaning of the law.

It is apparent that the plaintiff's duty to his sister was made subservient to his secular business. We are therefore of opinion that the ruling should have been given, that there was no evidence which would justify the jury in finding that the plaintiff was travelling from necessity or charity, within the meaning of the statute.

Exceptions sustained.

DEWIRE V. BAILEY.

(121 Mass. 169.)

Negligence — contributory — icy sidewalk.

The plaintiff attended an evening entertainment at the defendant's public hall, and on coming out slipped on snow and ice accumulated on the plank sidewalk in front of the door, and was injured. *Held*, that he was not precluded from recovery by the fact that he noticed the snow and ice on going in.*

REPORT for personal injuries by negligence. The head-note shows the facts. The defendant had judgment below.

E. B. Callender, for plaintiff.

O. S. Knapp & C. D. Adams, for defendant.

FIELD, J. The rulings of the justice presiding at the trial all rest upon the proposition that knowledge on the part of the plaintiff, at the time he entered upon the sidewalk, of the accumulation of snow and ice and of the unsafe condition of the sidewalk resulting therefrom, is in law conclusive evidence that he was not in the exercise of due care in attempting to pass over the sidewalk.

Looney v. McLean, 129 Mass. 33 ; s. c., 37 Am. Rep. 295, was an action by a tenant of a part of a building against the landlord to recover for injuries received in consequence of the giving way of one of the steps of a staircase used in common by the tenants, for the safe condition of which the landlord was responsible ; and it

* See *Braker v. Town of Covington* (69 Ind. 23), 25 Am. Rep. 202.

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was held "that the fact, if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care;" and *Whittaker v. West Boylston*, 97 Mass. 273, and *Reed v. Northfield*, 13 Pick. 94 (23 Am. Dec. 662), are cited. Other recent cases to the same effect are *George v. Haverhill*, 110 Mass. 506; *Whitford v. Southbridge*, 119 id. 564; *Lyman v. Amherst*, 107 id. 339; *Mahoney v. Metropolitan R. R.*, 104 id. 73; *Thomas v. Western Union Telegraph*, 100 id. 156; *Worden v. New Bedford*, 131 id. 23 (*ante*, 185).

In *Mahoney v. Metropolitan Railroad*, *ubi supra*, it was held "that the fact that the plaintiff saw the obstruction created by defendant, and knew its dangerous character, is not conclusive proof that he was negligent in attempting to pass it. A person who in the lawful use of a highway meets with an obstacle, may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party. In the case at bar, if the plaintiff had reasonable cause to believe that he could pass the obstruction in safety, and used reasonable care in the attempt, he is entitled to recover."

: It is evident that an obstruction may be of such a character that a court can say, as a matter of law, that no person in the exercise of reasonable prudence would attempt to pass over it; but the accumulation of snow and ice, such as is described in the exceptions in this case, does not in our opinion constitute such an obstruction.

It is contended by the defendant that the law in this respect is not the same in actions where the injuries are received on entering or leaving buildings which the plaintiff has expressly or impliedly been invited to enter by the defendant, who, as owner or occupant, is under an obligation toward him to keep them in a safe condition, as in actions where the injuries are occasioned by defects in public highways. It is difficult to see any ground for this contention. That contributory negligence on the part of the plaintiff will prevent him from maintaining his action is a common-law principle applicable to both of these classes of actions and to many others, and is independent of the statutes which impose a liability on towns for injuries received through defects or want of repair in highways. Those statutes in this Commonwealth may affect the degree of care required of the defendant, but do not touch the degree of care re-

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quired of the plaintiff. The same conduct of the plaintiff under the same circumstances must, under the rule of the common law, be held to be contributory negligence in all actions to which that rule applies. Nor do we find that any such distinction is supported by authority, although courts may not always have been consistent either with themselves or with other courts in deciding in the many different cases that have arisen what in law amounts to contributory negligence.

Wilson v. Charleston, 8 Allen, 137, cited by the defendant, was an action against a city for injuries received through a defect in the highway, and whether consistent or not with the later decisions of this court, is not an authority for the distinction suggested. In the case at bar, there was no contract or relation between the parties whereby the plaintiff assumed any risks or obligations other than those imposed on him by the general principles of law.

We think the law in a case of this kind is, that only when the nature of the obstruction is such that the court can say that it is not consistent with reasonable prudence and care that any person having knowledge of the obstruction should proceed to pass over it in the manner attempted, can the court rule that such knowledge prevents the plaintiff from maintaining his action; and that the nature of the obstruction in this case, as shown by the exceptions, was such that it ought to have been submitted to the jury to determine whether the plaintiff, even if he knew the condition of the sidewalk at the time he attempted to pass over it, was, under the circumstances, in the exercise of reasonable prudence and due care in attempting to pass over it in the manner he did.

Exceptions sustained.

 DAVIS V. OLD COLONY RAILROAD.

(131 Mass. 258.)

Corporation — ultra vires.

Neither a railroad corporation nor one for the manufacture and sale of musical instruments has any power to guarantee the payment of expenses of a public musical festival, although such festival was reasonably expected to be of pecuniary benefit to the guarantors, and expense was incurred in reliance upon the guaranty.*

*To same effect, *Harriman v. First Bryan Baptist Church* (83 Ga. 186), 39 Am. Rep. 117.

CONTRACT. The opinion states the case

M. F. Dickinson, Jr., & J. Fox, for plaintiffs.

J. H. Benton, Jr., for defendant in first case.

R. D. Smith and C. Allen, for other defendant.

GRAY, C. J. These actions are brought upon an agreement, signed by the Old Colony Railroad Company in the sum of \$6,000, and by the Smith American Organ Company in the sum of \$5,000, and by other corporations, partnerships and individuals in various sums, amounting in all to more than \$200,000.

The agreement is in these words

“BOSTON, *January 23, 1872.*

“We, the undersigned subscribers, hereby agree, each with the other, that we will contribute toward any deficiency (should there be one) that may arise toward defraying the expenses of the World’s Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed; provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto.”

At the trial of the first action, the plaintiffs offered to prove that the signature of each corporation was made by authority of its directors, with the reasonable belief that the holding of the festival proposed would be of great pecuniary benefit to the corporation by increasing its proper business, and that the signature would promote such holding; that the festival was held as mentioned in the agreement of guaranty; and that the reasonable expenditures therefor, made under authority of the plaintiffs, who relied upon that agreement in making them, exceeded the receipts by more than \$200,000.

The only point argued and decided when one of these cases was

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before us upon demurrer to the declaration was, that the promise of the subscribers was to the executive committee therein mentioned, and that these plaintiffs as such committee were the proper parties to sue thereon. *Davis v. Smith American Organ Co.*, 117 Mass. 456.

The principal question now presented by the answer, and which lies at the threshold of each case, is whether it was within the power of the defendant corporation to bind itself by such an agreement. Upon full consideration of the elaborate arguments of counsel upon that question, the court is of opinion that the agreement is *ultra vires*, and therefore no action can be maintained upon it against either defendant.

The reported cases on the subject are so numerous, that we shall refer to comparatively few of them, except the principal cases in England and the decisions of the Supreme Court of the United States and of this court.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a Court of Chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted. Gen. Sts., ch. 3, § 5; St. 1870, ch. 224, §§ 7, 11; *Whittenton Mills v. Upton*, 10 Gray, 582, 598; *Richardson v. Sibley*, 11 Allen, 65, 72; *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, 443; *East Anglian Railways v.*

Eastern Counties Railway, 11 C. B. 775, 811; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R., 7 H. L. 653.

There is a clear distinction, as was pointed out by Mr. Justice CAMPBELL in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, 398; by Mr. Justice HOAR in *Monument Bank v. Globe Works*, 101 Mass. 57, 58; s. c., 3 Am. Rep. 322, and by Lord Chancellor CAIRNS and Lord HATHERLEY in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R., 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party.

In the leading case of *Colman v. Eastern Counties Railway*, 10 Beav. 1, the directors of a railway company were restrained by injunction from carrying out an agreement by which, for the purpose of increasing its traffic, they proposed to guarantee certain profits to, and to secure the capital of, a steam-packet company, to ply between a port near one end of the railway in England and certain foreign ports; and Lord LANGDALE, M. R., said: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit, which notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion, that the powers which are given by an act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned." "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its

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proper use when made ; but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by their acts ; but it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is however no authority for any thing of that kind. It has been stated that these things, to a small extent, have frequently been done since the establishment of railways ; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever." 10 Beav. 14, 15. And after full consideration of the case he summed up his opinion thus : " To pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation is a thing which according to the terms of this act of Parliament they have not a right to do." " They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing any thing beyond it." 10 Beav. 17, 18. See also *Salomons v. Laing*, 12 Beav. 339, 352, 353.

In *Bagshaw v. Eastern Union Railway*, 7 Hare, 114 ; 2 Macn. & Gord. 389, and 2 Hall & Twells, 201, where a railway company, authorized by act of Parliament to purchase a branch line, and to raise a sum of money for the purpose of constructing that line, applied part of the sum so raised to the construction of its main line, Vice-Chancellor WIGRAM, and Lord Chancellor COTTENHAM on appeal, sustained the bill of a shareholder, not only to restrain such application of the rest of the sum, but also for an account of the part already illegally expended.

The same principles have been frequently applied in actions at law. In *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775, it was held that no action could be maintained by one railway company against another upon an agreement made by the latter to take a lease of the railway of the first company, and to pay the expenses incurred by that company in the soliciting and promoting of bills in Parliament for the extension and improvement

of that railway, even if the object and effect of the agreement were to increase the profits of the defendants' railway ; and Chief Justice JERVIS, in delivering the judgment of himself and Justices MAULE, WILLIAMS and TALFOURD, said : " This act is a public act, accessible to all, and supposed to be known to all ; and the plaintiffs must therefore be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be. It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act : and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act ; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway. This in truth is the same proposition in another form ; for if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line ? Whatever be their object or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway ; and if they cannot embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority. Every proprietor when he takes shares has a right to expect that the conditions upon which the act was obtained will be performed ; and it is no sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was

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obtained, and not expressly sanctioned by the legislature." "If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds." 11 C. B. 811-813. So in *Macgregor v. Dover & Deal Railway*, 18 Q. B. 618, the Court of Exchequer Chamber, in an opinion delivered by Baron ALDERSON, in which Justices MAULE, CRESSWELL, WILLIAMS and TALFOURD and Baron PLATT concurred, arrested judgment in an action brought by the Dover and Deal Railway Company upon the agreement of a person, interested in the Southeastern Railway Company, to pay the expenses of an application of the latter to Parliament to authorize it to establish a connecting railway, because "both plaintiffs and defendant here must be taken, with full knowledge of the powers conferred on the Southeastern Railway Company, to have made a contract by which the defendant is to bind the company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public act of Parliament." 18 Q. B. 632. In each of those cases, the plaintiff had actually incurred and paid the expenses sued for.

Baron PARKE stated the rule to be, that where a corporation is created by act of Parliament for particular purposes with special powers, "their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires* — that is, that the legislature meant that such a deed should not be made." *South Yorkshire Railway v. Great Northern Railway*, 9 Exch. 55, 84. See also *Scottish Northeastern Railway v. Stewart*, 3 Macq. 382, 415, by Lord WENSLEYDALE.

Lord ST. LEONARDS, while asserting that "the safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds;" and that railway companies "have all the powers incident to a corporation, except so far as they are restrained by their act of incorporation," and are "bound by contracts duly entered into by their directors for purposes which they

have treated as within the objects of their acts, and which cannot be clearly shown not to fall within them ;” and inclining “to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into”—distinctly recognized that “directors cannot act in opposition to the purpose for which their company was incorporated,” nor “bind their companies by contracts foreign to the purposes for which they were established.” *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 331, 371, 373, 381.

Lord Chancellor CRANWORTH, in the same case, said that the English authorities above cited had “established the proposition that a railway company cannot devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove ;” and after a review of the cases, repeated, “It must therefore be now considered as a well-settled doctrine that a company incorporated by an act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be.” 5 H. L. Cas. 345, 348. His opinion, in which Lord BROUGHAM concurred, upon which the House of Lords held that no action would lie against a railway company on an agreement of its projectors to advance money to construct a pier and harbor at the end of a proposed branch of the railway, is to the like effect. *Caledonian & Dumbartonshire Railway v. Magistrates of Helensburgh*, 2 Macq. 391, 416, 417, 422. And he afterward observed that he thought the statement of Baron PARKE, above quoted, “the more correct way of enunciating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into.” *Shrewsbury & Birmingham Railway v. Northwestern Railway*, 6 H. L. Cas. 113, 135–137.

In *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R., 7 H. L. 653, and L. R., 9 Ex. 224, the objects for which a company, registered under the English Joint Stock Companies Act of 1862, was created, were stated in its memorandum of association to be “to

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make and sell, or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock ; to carry on the business of mechanical engineers and general contractors ; to purchase, lease, work and sell mines, minerals, land and buildings ; to purchase and sell, as merchants, timber, coal, metals or other materials, and to buy and sell any such materials on commission or as agents." The directors agreed to purchase a concession for making a railway in a foreign country, and afterward (on account of difficulties existing by the law of that country) agreed to assign the concession to an association formed there, which was to supply the materials for the construction of the railway, and to receive periodical payments from the English company. In an action at law brought by the foreign associates against the English company upon this agreement, it was held in the lower courts, as well as in the House of Lords, to be *ultra vires*. The judges below were divided in opinion upon the question whether it had been ratified by the stockholders so as to bind the company. But in the House of Lords it was unanimously held, by Lord Chancellor CAIRNS and Lords CHELMSFORD, HATHERLY, O'HAGAN and SELBORNE, that the contract was not within the scope of the memorandum of association, and was therefore void and incapable of being ratified, and the action could not be maintained.

Lord SELBORNE said : "The action in this case is brought upon a contract, not directly or indirectly to execute any works, but to find capital for a foreign railway company, in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the Ashbury Company. All your lordships, and all the judges in the courts below, appear to be so far agreed. But this, in my judgment, is really decisive of the whole case. I only repeat what Lord CRANWORTH, in *Hawkes v. Eastern Counties Railway Company* (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation, created by an act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is under that act their fundamental, and (except in certain specified particulars) their unalterable law ; and they are incorporated only for the objects and purposes ex-

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pressed in that memorandum. The object and policy of those provisions of the statute which prescribed the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses fundamental law, were not held to be void, and *ultra vires*, of the company, as well as beyond the power delegated to its directors or administrators. It was so held in the case of the *East Anglian Railway Company*, and in other cases upon railway acts, which cases were approved by this House in *Hawke's* case; and I am unable to see any distinction for this purpose between statutory corporations under railway acts, and statutory corporations under the Joint Stock Companies Act of 1862." "I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association, are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do. This being so, it necessarily follows (as indeed seems to me to have been conceded in Mr. Justice BLACKBURN'S judgment) that where there could be no mandate, there cannot be any ratification; and that the assent of all the shareholders can make no difference when a stranger to the corporation is suing the company itself in its corporate name, upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation, which the law says cannot and shall not be so." L. R., 7 H. L. 693-695.

In a very recent case of *Attorney-General v. Great Eastern Railway*, 5 App. Cas. 473, 478, in which the contract in question was held to be expressly authorized by the terms of the act of Parliament, and therefore not *ultra vires*, Lord Chancellor SELBORNE, while expressing the opinion that "this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*," declared his sense of the importance of maintaining the doctrine of *ultra vires*, as explained in the case of *Ashbury Railway &*

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Iron Co. v. Riche ; and Lord BLACKBURN said, “ That case appears to me to decide at all events this, that where there is an act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited ; and consequently that the Great Eastern Company, created by act of Parliament for the purpose of working a line of railway, is prohibited from doing any thing that would not be within that purpose ; ” although he also agreed “ that those things which are incident to, and may reasonably and properly be done under, the main purpose, though they may not be literally within it, would not be prohibited.” 5 App. Cas. 481.

These statements are the more significant, because Baron BRAMWELL in the same case below (11 Ch. D. 449, 501–503), had cast doubts upon the correctness of the decision in the case of *East Anglian Railways v. Eastern Counties Railway* ; and Lord BLACKBURN himself, when a justice of the Court of Queen’s Bench, had more than once approved Baron PARKE’S form of stating the doctrine. *Chambers v. Manchester & Milford Railway*, 5 B. & S. 588, 610 ; *Taylor v. Chichester & Midhurst Railway*, L. R., 2 Ex. 356, 384 ; *Riche v. Ashbury Railway Carriage & Iron Co.*, L. R., 9 Ex. 264.

The same principles have been clearly and positively enunciated in two unanimous judgments of the Supreme Court of the United States.

In *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, two corporations, created by the laws of Indiana to construct distinct though connecting lines of railroad in that State, were consolidated by agreement, and conducted the business of both lines under a common board of management, which gave notes in the name of the consolidated company in payment for a steamboat to be employed on the Ohio river and to run in connection with the railroads. After the execution of the notes and the acquisition of the steamboat, this relation between the corporation was legally dissolved. It was held, that an action brought by an indorsee against the two corporations upon the notes could not be maintained.

Mr. Justice CAMPBELL, in delivering judgment, said, “ The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these to ascertain the

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validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority."

He then referred with approval to the cases of *Colman v. Eastern Counties Railway*, *East Anglian Railways v. Eastern Counties Railway*, and *Macgregor v. Dover & Deale Railway*, above cited, and added: "It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, Had the corporation the capacity to make the contract, in the fulfillment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority." Judgment was therefore rendered for the defendants. It is to be observed that in that case there was no suggestion that the plaintiff took the notes sued on without notice of the illegality in the original consideration, which would have presented a different question. *Lexington v. Butler*, 14 Wall. 282; *Macon v. Shores*, 97 U. S. 272; *Monument Bank v. Globe Works*, 101 Mass. 57; s. c., 3 Am. Rep. 322.

In *Thomas v. Railroad Co.*, 101 U. S. 71, a railroad corporation, without authority of the legislature, leased its railroad to three persons for twenty years, for the consideration of one-half of the

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gross sums collected from the operation of the road by the lessees during the term, reserving the right at any time to terminate the contract and retake possession of the road, paying such damages for the value of the unexpired term as should be determined by arbitration. At the end of five years the corporation resumed possession, and the accounts for that period were adjusted and paid. It was held that no action could be maintained against the corporation to recover the value of the unexpired term. The opinion was delivered by Mr. Justice MILLER.

It was argued by the counsel for the plaintiffs in that case that though there was nothing in the language of the charter which authorized the making of this agreement, yet "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution, and the State may, by proper process, forfeit the charter." But the court said: "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." The court then, after referring to some of the English cases above cited, and particularly to the decision of the House of Lords in *Ashbury Railway Carriage & Iron Co. v. Riche*, as establishing "the broad doctrine that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action," expressed the opinion that that decision "represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle."

The court indeed further said: "There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is, that where a corporation like a

railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." This proposition is supported by the cases there cited, and by many others. See *Richardson v. Sibley*, 11 Allen, 65, 67; *Whittenton Mills v. Upton*, 10 Gray, 582; *Proprietors of Locks and Canals v. Nashua and Lowell Railroad*, 104 Mass. 1; s. c., 6 Am. Rep. 181; *Middlesex Railroad v. Boston and Chelsea Railroad*, 115 Mass. 347. But that the decision was not intended to be put exclusively upon this ground is manifest from the terms in which it was introduced, as well as from those in which the general doctrine had been already laid down, and from the concluding sentence of the opinion.

The judgments of the English courts, and of the Supreme Court of the United States, to which we have referred, do but affirm and apply principles long ago declared by this court.

More than fifty years since, Chief Justice PARKER said: "The power of corporations is derived only from the act, grant, charter or patent by which they are created. In this Commonwealth the source and origin of such power is the legislature, and corporations are to exercise no authority, except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators." *Salem Milldam v. Ropes*, 6 Pick. 23, 32. And the importance, for the security of the rights of each stockholder, of a steady adherence to the principle that "corporations can only exercise their powers over their respective members for the accomplishment of limited and well-defined objects," was strongly stated by Chief Justice SHAW in 1839. *Spaulding v. Lowell*, 23 Pick. 71, 75.

As was observed in *Morville v. American Tract Society*, 123 Mass. 129, 136, "The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is

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always implied where there is no positive restriction in the charter." Thus a corporation may let or mortgage property lawfully held by it under its charter, and not immediately needed for its own business. *Simpson v. Westminster Hotel Co.*, 8 H. L. Cas. 712; *Brown v. Winnisimmet Co.*, 11 Allen, 326; *Hendee v. Pinkerton*, 14 id. 381. A corporation established "for the purpose of manufacturing and selling glass" may contract to purchase glassware from a like corporation to keep up its own stock and supply its customers while its works are being put in repair. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315. A corporation authorized to purchase and hold water power created by the erection of dams, and to hold real estate, may, when the water power has been lawfully extinguished, sell its lands, and as part of the contract of sale agree to raise their grade. *Dupee v. Boston Water Power Co.*, 114 Mass. 37. A railroad corporation may agree to transport as a common carrier over connecting railroads goods intrusted to it for carriage over its own line. *Hill Manuf. Co. v. Boston and Lowell Railroad*, 104 Mass. 122; *Railway Co. v. McCarthy*, 96 U. S. 258. And it cannot dispute its liability for goods delivered to it to be carried over a railroad of which it is in actual possession and use under a lease, on the ground that the lease is void. *McCluer v. Manchester and Lawrence Railroad*, 13 Gray, 124.

Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation. *Chester Glass Co. v. Dewey*, 16 Mass. 94 (8 Am. Dec. 128); *Old Colony Railroad v. Evans*, 6 Gray, 25; *National Pemberton Bank v. Porter*, 125 Mass. 333; s. c., 28 Am. Rep. 235; *National Bank v. Matthews*, 98 U. S. 621.

In *Chester Glass Co. v. Dewey*, the plaintiff, a corporation established for the purpose of manufacturing glass, kept a shop near its factory, for the accommodation of its workmen, containing a general assortment of such goods as are usually kept in country stores; and the defendant was a carpenter, living near, who made boxes and did other carpenter's work for the corporation.

In an action for the price of goods sold and delivered to him from the shop, the defendant objected that the plaintiff was not authorized by law to keep such a shop and to sell goods in this manner; and it was held that this objection could not avail him. The lead-

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ing reason assigned was, "The legislature did not intend to prohibit the supply of goods to those employed in the manufactory;" in other words, the contract sued on was not *ultra vires*. That reason being decisive of the case, the further suggestion in the opinion, "Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused," was, as has been since pointed out, wholly *obiter dictum*. *Whittenton Mills v. Upton*, 10 Gray, 599.

In *Old Colony Railroad v. Evans*, the defendant, being under contract to haul a large quantity of gravel on to lands belonging to the city of Boston, made an agreement in writing with the plaintiff corporation, by which it agreed to purchase a tract of land in Quincy, and he agreed to take gravel therefrom, and to carry it in his own cars over the plaintiff's road to Boston, paying a specified toll; the defendant afterward further agreed in writing, that if the plaintiff would purchase another tract for the same purpose, he would pay the cost of the first tract; and both tracts were purchased by the plaintiff. The objection that the corporation had no right to trade in gravel or land was raised by the defendant by way of defense to a bill in equity by the corporation for specific performance of his second agreement by accepting a deed of and paying for the first tract. There can be no doubt of the correctness of the decision overruling the objection. The corporation by its purchase had acquired a title to the land, which was good against all the world except possibly the Commonwealth; and the defendant, having knowledge of all the facts, did not and could not object that the title might be defeasible by the Commonwealth. *Banks v. Poitiaux*, 3 Rand. 136; *Leazure v. Hillegas*, 7 S. & R. 313; *Goundie v. Northampton Water Co.*, 7 Penn. St. 233; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, 373; *Smith v. Sheeley*, 12 Wall. 358; *Commonwealth v. Wilder*, 127 Mass. 1, 6. Although it was said in the opinion that the purchase of the land seemed to have been made as a mode of promoting the purposes of the plaintiff's incorporation, the increasing of its business in transportation upon its railroad, and not as an object of trade or speculation in lands, the point adjudged was that the want of corporate capacity to purchase and sell lands was not a legal objection to the maintenance of the bill. The only authority referred to by the court was the treatise of Angell & Ames on Corporations, §§ 10, 11, 151, 153, of which the

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section most directly applicable is section 153, in which it is clearly laid down that a court of equity will enforce against a natural person his agreement to purchase of a corporation lands which it holds in violation of its charter, but will not enforce against a corporation its agreement to purchase lands for a purpose not authorized by its charter. The distinction is obvious. In the latter case, to enforce the agreement against the corporation is to compel the application of its funds to a purpose not authorized by law. In the former case, to compel the individual to take and pay for the property according to his agreement is the surest and most effectual means of replacing in the treasury of the corporation, for its lawful uses and the benefit of its stockholders, the funds which it had misapplied. *Rutland & Burlington Railroad v. Proctor*, 29 Vt. 93, 97.

In *National Pemberton Bank v. Porter*, the point decided was, that the objection that a National bank had exceeded its powers by purchasing a promissory note from an indorsee thereof did not prevent it from maintaining an action upon the note against the maker; for the reasons, that the action was not brought upon the contract of purchase or against any party to that contract, and that it was not necessary in this Commonwealth that the plaintiff in an action on the promissory note should have any title or interest in it. See also *Attleborough National Bank v. Rogers*, 125 Mass. 339.

In *National Bank v. Matthews*, the act of Congress providing that a National bank might purchase and hold real estate for certain enumerated purposes only, of which to secure money lent at the time of taking a mortgage was not one, was held by a majority of the court, in accordance with the opinion of Chancellor KENT in *Silver Lake Bank v. North*, above cited, not to make void a mortgage given to secure the payment of a promissory note for money so lent, nor to prevent the bank from enforcing such a mortgage. A like decision was made in *National Bank v. Whitney*, 103 U. S. 99.

A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White v. Franklin Bank*, 22 Pick. 181; *Morville v. American Tract Society*, 123 Mass. 129, 137; *In re Cork & Youghal Railway*, L. R., 4 Ch. 748. But when the corporation has actually received nothing in

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money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian Railways v. Eastern Counties Railway*, *Macgregor v. Dover & Deal Railway*, *Ashbury Railway Carriage & Iron Co. v. Riche and Thomas v. Railway Co.*, above cited; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43.

The Old Colony Railroad Company is a railroad corporation, established by public statutes of the Commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon. Stats. 1844, ch. 150; 1854, ch. 133; 1862, ch. 149; 1872, ch. 143. The holding of a "world's peace jubilee and international musical festival" is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. It follows that in the first of the actions before us there must be judgment for the defendant.

The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Company was organized under the general act of 1870, chapter 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate thereof filed in the office of the secretary of the Commonwealth pursuant to that act, to "the manufacture and sale of reed organs and other musical instruments." The power to manufacture and sell goods of a particular description

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does not include the power to partake in, or to guarantee the profits of, an enterprise that may be expected to increase the use of or the demand for such goods. The case of *Ashbury Railway Carriage & Iron Co. v. Riche*, before cited, is directly in point.

This ground being decisive of the second action, it becomes unnecessary to consider the other objections to its maintenance, and the plaintiffs' exceptions must be overruled.

Exceptions overruled.

ROBINSON'S CASE.

(131 Mass. 376.)

Statute — construction — woman lawyer.

.. woman may not be admitted to the bar as a " citizen."²²

APPPLICATION for admission to the bar. The opinion states the case.

Petitioner, in person.

R. M. Morse, Jr. & H. L. Harding, contra.

GRAY, C. J. The question presented by this petition, and by the report on which it has been reserved for our determination, is whether, under the laws of the Commonwealth, an unmarried woman is entitled to be examined for admission as an attorney and counsellor of this court.

This being the first application of the kind in Massachusetts, the court, desirous that it should be fully argued, informed the executive committee of the bar association of the city of Boston of the application and has received elaborate briefs from the petitioner in support of her petition and from two gentlemen of the bar as *amici curiæ* in opposition thereto.

The statute under which the application is made is as follows :
" A citizen of this State, or an alien who has made the primary declaration of his intention to become a citizen of the United

²² But under a statute allowing the admission of " such persons as are qualified," women are entitled to admission. *Matter of Hall*, Connecticut Supreme Court, September, 1882

States, and who is an inhabitant of the State, of the age of twenty-one years and of good moral character, may on the recommendation of an attorney, petition the Supreme Judicial or Superior Court to be examined for admission as an attorney, whereupon the court shall assign a time and place for the examination, and if satisfied with his acquirements and qualification she shall be admitted." Stat. 1876, ch. 197.

The word "citizen," when used in its most common and most comprehensive sense, doubtless includes women ; but a woman is not by virtue of her citizenship, vested by the Constitution of the United States, or by the Constitution of the Commonwealth, with any absolute right, independent of legislation, to take part in the government, either as a voter or as an officer, or to be admitted to practice as an attorney. *Minor v. Wapperset*, 21 Wall. 162 ; *Bradwell v. Illinois*, 16 id. 130 ; *Wheeler v. Hall*, 6 Allen, 558 ; *Jackson v. Phillips*, 14 id. 539, 571.

The rule that " words importing the masculine gender may be applied to females," like all other general rules of construction of statutes, must yield when such construction would be either " repugnant to the context of the same statute," or " inconsistent with the manifest intent of the legislature." Gen. Stats., ch. 3, § 7.

The intention of the legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone, and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms part, and in the light of the common law and of previous statutes upon the same subject. And the legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to introduce a fundamental change in long-established principles of law.

By the law of England, which was our law from the first settlement of the country until the American Revolution, the crown, with all its inherent rights and prerogatives, might indeed descend to a woman or to an infant ; but under the degree of a queen, no woman, married or unmarried, could take part in the government of the State. Women could not sit in the House of Commons or the House of Lords, nor vote for members of Parliament. 4 Inst. 5 ; *Countess of Rutland's case*, 6 Rep. 52 b ; *Chorlton v. Lings*, L. R., 4 C. P. 374, 391, 392. They could not take part in the administration of justice, either as judges or as jurors, with the single

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exception of inquiries by a jury of matrons upon a suggestion of pregnancy. 2 Inst. 119, 121; 3 Bl. Com. 362; 4 id. 395; WILLES, J., in L. R., 4 C. P. 390, 391. And no case is known in which a woman was admitted to practice as an attorney, solicitor or barrister.

The only English "instance of a woman lawyer," cited by the petitioner, is that stated in a note of Mr. Butler to Coke upon Littleton, as follows: "The celebrated Anne, Countess of Pembroke, Dorset and Montgomery, had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby, she sat with the judges on the bench." Co. Litt. 326 a, note 280. No authority is given for the statement. The office of sheriff of Westmoreland was granted by King John in the thirteenth century to Robert de Veteripont, or Vipont, and his heirs general, and after the death of his last heir male in 1265 descended to Isabella, wife of Roger de Clifford, and continued to be an hereditary office until 1850, when it was put by act of Parliament on the footing of other like offices. 3 Selden's Works, 1839; Co. Lit. 222; Collins on Baronies, 251, 317, 319, 321; Stat. 13 and 14 Vict., ch. 30. The Countess Anne was born in 1590, took the office by descent from her father George, Lord Clifford and Earl of Cumberland, in 1605, and died in 1676, leaving a very full autobiography, a transcript of which is preserved among the Harleian Manuscripts in the British Museum, in which she says of her ancestress Isabella de Clifford, that "in her widowhood she sat in person as sherifess in the county of Westmoreland upon the bench with the judges, as appears by the pleas and records of her time;" and mentions the appointment of a deputy sheriff by herself in 1651. It is quite possible that as a matter of ceremony, or by way of asserting her title to the office, she (as well as her ancestress three centuries before) may sometimes herself have attended the judges, or that in accordance with English usage, a person of her rank and distinction, when present in court, may have been invited by them to sit upon the bench. But that she habitually discharged the general duties of the office in person has been shown by an accomplished scholar, after careful research, to be highly improbable in fact. 4 Craik's Romance of the Peerage, 162. And she could not have done so without violating the well-settled law.

The office of sheriff was partly judicial and partly ministerial; the judicial functions could not be delegated; but the ministe-

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rial duties, including that of attendance upon the judges, might be performed by deputy. Dalton's Sheriff, chs. 1, 4 ; *Bandal's* case, Noy, 21 ; Bacon's Use of the Law, 4 Bacon's Works (ed. 1803), 97 ; WILLES, J., in L. R., 4 C. P. 390. When such an hereditary office descended to a woman, she might exercise the office by deputy (at least with the approval of the Crown), but not in person ; nor could it be originally granted to any woman, because of her incapacity of executing public offices. *Duke of Buckingham's* case, Jenk. Cent. 6, pl. 14 ; s. c., Dyer, 285 b, pl. 39 ; Keilw. 17 ; 4 Inst. 128 ; Co. Litt. 107 b, 165 a ; *Case of the Great Chamberlain of England*, 2 Bro. P. C. (2d ed.) 146 ; s. c., 36 Lord's Journals, 302. Women were permitted to hold the office of keeper of a castle or jail, governor of a work-house, forester or constable, for the reason that each of those offices might be executed by a deputy. *Lady Russell's* case, Cro. Jac. 17 ; 2 Inst. 382 ; *Anon.*, 2 Ld. Raym. 1014 ; s. c., 3 Salk. 2 ; 4 Inst. 311 ; 2 Hawk. ch. 10, § 37 ; WILLES, J., in L. R., 4 C. P. 389. They were decided to be capable of voting for and of being elected to the office of sexton of a parish, upon the ground that this was not an office that concerned the public. *Olive v. Ingram*, 2 Stra. 1114 ; s. c., Vin. Abr., Feme A, pl. 7, 8 ; 7 Mod. 263, 273, 274. And we are not aware of any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged to be competent to hold, without express authority of statute, except that of overseer of the poor, a local office of an administrative character, in no way connected with judicial proceedings. *The King v. Stubbs*, 2 T. R. 395.

An attorney at law is not indeed in the strictest sense a public officer. But he comes very near it. As was said by Lord HOLT, "the office of an attorney concerns the public, for it is for the administration of justice." *White's* case, 6 Mod. 18 ; *Bradley's* case, 7 Wall. 364, 378, 379. By our statutes he is required, upon his admission, to take and subscribe in open court the oaths to support the Constitutions of the United States and of this Commonwealth, as well as the oath of office ; this oath, the form of which has remained without substantial change since the time of Lord HOLT, nearly a hundred and eighty years, pledges him to conduct himself "in the office of an attorney within the courts" according to the best of his knowledge and discretion, and with all good fidelity as well to the courts as to his clients ; and he becomes by his admis-

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sion an officer of the court, and holds his office during good behavior, subject to removal by the court for malpractice. Gen. Stats., ch. 121, §§ 30, 31, 34; Rev. Stats., ch. 88, §§ 21, 22, 25, and Commissioners' notes; Stat. 1785, ch. 23; Prov. St., 1701-2 (1 Anne), ch. 7-1 Prov. Laws (State ed.), 467; *Randall's case*, 11 Allen, 473; *Randall v. Brigham*, 7 Wall. 523; *Robinson's case*, 19 id. 505, 512.

There is nothing in the action of the legislature or of the judiciary of the Commonwealth which has any tendency to prove such a change in the law and usage prevailing at the time of our separation from the mother country as to admit women to the exercise of any office that concerns the administration of justice.

In 1871 the governor and council required the opinion of the justices of this court, under chap. 3, art. 2, of the Constitution of the Commonwealth, upon the following questions: "First. Under the Constitution of this Commonwealth, can a woman, if duly appointed and qualified as a justice of the peace, legally perform all acts pertaining to such office? Second. Under the laws of this Commonwealth, would oaths and acknowledgments of deeds, taken before a married or unmarried woman, duly appointed and qualified as a justice of the peace, be legal and valid? Although the provisions of the Constitution and statutes of the Commonwealth regarding the office of justice of the peace, while they do not mention women, are not in terms limited to men, yet the justices answered both the questions proposed in the negative, for the following reasons: "By the Constitution of the Commonwealth, the office of justice of the peace is a judicial office, and must be exercised by the officer in person, and a woman, whether married or unmarried, cannot be appointed to such an office. The law of Massachusetts at the time of the adoption of the Constitution, the whole frame and purport of the instrument itself, and the universal understanding and unbroken practical construction for the greater part of a century afterwards, all support this conclusion, and are inconsistent with any other. It follows that if a woman should be formally appointed and commissioned as a justice of the peace, she would have no constitutional or legal authority to exercise any of the functions appertaining to that office." Opinion of Justices, 107 Mass. 604.

Whenever the legislature has intended to make a change in the legal rights or capacities of women, it has used words clearly manifesting its intent and the extent of the change intended. The

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statutes permitting a married woman to hold and convey property, to make contracts, to sue and be sued, and to be an executrix, administratrix, guardian or trustee, have in no way enlarged the capacity of any woman, married or unmarried, to hold office, and have no application to single women or to legal disabilities to which married and unmarried women alike are subject. Gen. Stats., ch. 108.; Stats. 1869, chaps. 304, 409 ; 1871, chap. 312 ; 1874, chap. 184. The Statute of 1869, chap. 346, providing that "any parish or religious society may admit to membership women, who shall have all the rights and privileges of men," would seem to imply a doubt, at least, whether they could previously have been admitted to such membership with equal privileges. The house of representatives in 1874 having taken the opinion of the justices of this court that there was nothing in the Constitution itself to prevent women from being members of school committees, the legislature thereupon enacted that no person should be deemed to be ineligible to serve upon a school committee by reason of sex ; and it has since expressly authorized women to vote at election of school committees. Opinion of Justices, 115 Mass. 602 ; Stats. 1874, chap. 389 ; 1879, chap. 223 ; 1881, chap. 191. We have not been referred to, and do not recall, any other statute respecting the legal capacity of women, except those which require for their serving on certain public boards connected with the supervision of charitable or reformatory institutions or of prisons. Stats. 1877, chap. 195 ; 1879, chaps. 291, 294. In making innovations upon the long-established system of law on this subject, the legislature appears to have proceeded with great caution, one step at a time ; and the whole course of legislation precludes the inference that any change in the legal rights or capacities of women is to be implied, which has not been clearly expressed.

The only statute making any provisions concerning attorneys, that mentions women, is the poor debtor act, which, after enumerating among the cases in which an arrest of the person may be made on execution in an action of contract, that in which "the debtor is an attorney-at-law," who has unreasonably neglected to pay to his client money collected, enacts, in the next section but one, that "no woman shall be arrested on any civil process except for tort." Gen. Stats., chap. 124, §§ 5, 7. If these provisions do not imply that the legislature assumed that women should not be attorneys, they certainly have no tendency to show that it intended that they should.

The word "citizen," in the statute under which this application

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is made, is but a repetition of the word originally adopted with a view of excluding aliens, before the Stat. of 1852, chap. 154, allowed those aliens to be admitted to the bar who had made the preliminary declaration of intention to become citizens. Rev. Stats., chap. 88, § 19; Gen. Stats., chap. 121, § 28. The re-enactment of the act relating to the admission of attorneys in the same words without more, so far as relates to the personal qualifications of the applicant, since other statutes have expressly modified the legal rights and capacities of women in other important respects, tends rather to refute than to advance the theory that the legislature intended that these words should comprehend women.

No inference of an intention of the legislature to include women in the statutes concerning the admission of attorneys can be drawn from the mere omission of the word "male." The only statute to which we have been referred, in which that word is inserted, is the statute concerning the qualifications of voters in town affairs, which, following the language of the article of the Constitution that defines the qualifications of voters for governor, lieutenant-governor, senators and representatives, speaks of "every male citizen of twenty-one years of age," etc. Gen. Stats., chap. 18, § 19; Const. Mass. Amendments, art. 3. Words which taken by themselves would be equally applicable to women and to men are constantly used in the Constitution and statutes, in speaking of offices which it could not be contended, in the present state of the law, that women were capable of holding.

The courts of the Commonwealth have not assumed by their rules to admit to the bar any class of persons not within the apparent intent of the legislature as manifested in the statutes. The word "person," in the latest rule of court upon the subject, was the word used in the rule of 1810 and in the statutes of 1785 and 1836, at times when no one contemplated the possibility of a woman's being admitted to practice as an attorney. 121 Mass. 600; 6 id. 382; Stats. 1785, chap. 23; Rev. Stats., chap. 88, § 20; Gen. Stats., chap. 121, § 29.

The United States Court of Claims, at December term, 1873, on full consideration, denied an application of a woman to be admitted to practice as an attorney, upon the ground "that under the Constitution and laws of the United States a court is without power to grant such an application, and that a woman is without legal capacity to take the office of an attorney." *Lockwood's case*, 9 Ct.

of Claims, 346, 356. At October term, 1876, of the Supreme Court of the United States, the same petitioner applied to be admitted to practice as an attorney and counsellor of that court, and her application was denied. The decision has not been officially reported, but upon the record of the court, of which we have an authentic copy, it is thus stated : "Upon the presentation of this application, the chief justice said, that notice of this application having been previously brought to his attention, he had been instructed by the court to announce the following decision upon it : By the uniform practice of the court from its organization to the present time, and by the fair construction of its rules, none but men are admitted to practice before it as attorneys and counsellors. This is in accordance with immemorial usage in England, and the law and practice in all the States until within a recent period ; and the court does not feel called upon to make a change until such a change is required by statute or a more extended practice in the highest courts of the States." The subsequent act of Congress of February 15, 1879, enables only those women to be admitted to practice before the Supreme Court of the United States, who have been for three years members of the bar of the highest court of a State or Territory, or of the Supreme Court of the District of Columbia.

The conclusion that women cannot be admitted to the bar under the existing statutes of the Commonwealth is in accordance with judgments of the highest courts of the State of Illinois and Wisconsin. *Bradwell's case*, 55 Ill. 535 ; *Goodell's case*, 39 Wis. 232 ; s. c, 20 Am. Rep. 42. The suggestion in the brief of the petitioner, that women have been admitted in other States, can have no weight here, in the absence of all evidence that (except under clear affirmative words in a statute) they have ever been so admitted upon deliberate consideration of the question involved, or by a court whose decisions are authoritative.

It is hardly necessary to add that our duty is limited to declaring the law as it is, and that whether any change in that law would be wise or expedient is a question for the legislative and not for the judicial department of the government.

Petition dismissed.

Potts v. New York and New England Railroad Company.

POTTS v. NEW YORK & NEW ENGLAND RAILROAD COMPANY.

(181 Mass. 455.)

Carrier — lien — part delivery.

A carrier having delivered part of a quantity of goods consigned to one person, without collecting the freight, has a lien therefor upon the part undelivered, even as against the consignor's right of stoppage in transit.

TORT for conversion of coal. The opinion and head-note show the case. The defendant had judgment below.

W. S. B. Hopkins, for plaintiff.

F. P. Goulding, for defendant.

GRAY, C. J. A carrier of goods consigned to one person under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the rest without proof of an intention so to do. *Sodergren v. Flight*, cited in 6 East, 622; Abbott on Shipping (7th ed.), 377; *Lane v. Old Colony R. R.*, 14 Gray, 143; *New Haven & Northampton Co. v. Campbell*, 128 Mass. 104; s. c., 35 Am. Rep. 360. And when the consignor delivers goods to one carrier to be carried over his route, and thence over the route of another carrier, he makes the first carrier his forwarding agent; and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. *Briggs v. Boston & Lowell R. R.*, 6 Allen, 246, 250.

The right of stoppage *in transitu* is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. *Bloxam v. Sanders*, 4 B. & C. 941, 948, 949, and 7 D. & R. 396, 405, 406; *Rowley v. Bigelow*, 12 Pick. 307, 313 (23 Am. Dec. 607). This right is indeed paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account. *Oppenheim v. Russell*, 3 B. & P. 42; *Jackson v. Nichol*, 5 Bing. N. C. 508, 518, and 7 Scott, 577, 591. See also, *Butler v. Woolcott*, 2 N. R. 64; *Sears v. Wills*, 4 Allen, 212, 216. But the common-law lien of a carrier upon a

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particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried; and no authority has been cited, and no reason offered, to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against the consignee.

Judgment for the defendant.

COMMONWEALTH V. BAKEMAN.

(181 Mass. 577.)

Criminal law — adultery — joint indictment — conviction of one.

On an indictment against a man and a married woman for adultery, the man alone may be convicted although the woman was too drunk to consent to the intercourse. (*See note, p. 249.*)

CONVICTION of adultery. The head-note shows the case.

C. Delano, for Bakeman.

C. H. Barrows, assistant attorney-general, for Commonwealth.

ALLEN, J. The indictment charges a joint act by both defendants, constituting a crime in each. It is the common case of different defendants jointly indicted for a crime which may be committed by one alone. The charge is several as well as joint, and one defendant can be convicted upon proof of a several act by him. Such indictments must be construed as if they contained the allegations that the acts constituting the offense, and charged to have been done by the defendants jointly, were also done by each defendant separately. In accordance with that construction, the indictment in this case includes the allegations that each of the defendants committed the crime by each having carnal knowledge of the body of the other. *Commonwealth v. Elwell*, 2 Met. 190; *Commonwealth v. Griffin*, 3 Cush. 523; *Commonwealth v. Slate*, 11 Gray, 60; *Commonwealth v. Cook*, 12 Allen, 542. When a crime charged is one which consists in the concurrent act of two or more, such as

conspiracy, such joint action must be alleged and proved. But adultery is not such a crime. One person may be alone guilty of it. The act of sexual intercourse by a married man with an unmarried woman, or by an unmarried man with a married woman, is adultery in the man without regard to the guilt of the woman. It is an act committed by him, between him and the woman, although she is not the criminal or conscious participant. And it is no less adultery that it is also rape. The offenses are different in the nature of the wrong done, and in the facts which constitute them. Neither includes the other; and a defendant may be convicted of either without allegation or proof of some fact essential to the other. Carnal knowledge of a woman is the fact common to both; if it is with force and against her will the crime is rape, and the fact that she is married is immaterial; if she is a married woman the crime is adultery, and the fact that it is by force is immaterial. That a man cannot commit rape upon a married woman without also committing adultery, only shows that he commits both crimes by one act which includes all the elements of both. *Morey v. Commonwealth*, 108 Mass. 433; *State v. Sanders*, 30 Iowa, 582.

Exceptions overruled.

NOTE BY THE REPORTER.—On the other hand, in *State v. Thomas*, 53 Iowa, 214, the crimes of rape and incest were charged in the same act in one indictment, and it was held bad, because mutual consent is necessary to incest. The court said in the prevailing opinion: "Consent, of course, excludes rape. Whether force and want of consent exclude incest must be determined by the construction which should be put upon the section of the Code above cited. In construing that section it is to be observed that to constitute the crime of incest the parties must have carnal knowledge of each other. It is not sufficient that the man should have carnal knowledge of the woman, unless it follows that in such case she would necessarily have carnal knowledge of him. We come, then, to the question as to whether it can be said that a woman who is ravished has carnal knowledge of the man, within the meaning of the statute. In our opinion it cannot. The very use of the word knowledge indicates that the connection is to be deemed one of the mind as well as the body. It is further to be observed that the statute seems to imply that a person is not to be deemed singly guilty of incest. The language is: 'They shall be deemed guilty of incest.' Possibly if the connection should be accomplished by fraud, the party perpetrating the fraud might be deemed guilty of incest. The innocent party, of course, could not be. Again, it is easy to see that rape and incest have a distinct element of criminality. The use of force is criminal, but this criminality is essentially different from this corruption of the mind of the other party where force is wanting.

"As favoring the construction contended for by the counsel of the State, the case of *Commonwealth v. Goudhue*, 2 Metc. 198, is cited. In that case it was held that the defendant might be convicted of incest notwithstanding the illicit connection might have been accomplished by force. The same was held in *People v. Rowle*, 3 Mich. N. P. 209. The latter decision was made under a statute similar to ours, but it is not entitled to much weight as an authority.

"In *People v. Harriden*, 1 Park. 844, it was held under a statute similar to ours, that where this illicit connection is accomplished by force the defendant cannot be convicted

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of incest, but only of rape. See also *De Groat v. People*, 39 Mich. 124. In *Noble v. State*, 23 Ohio St. 541, the court assumed, and stated by way of argument, that the crime of incest can be committed only by two willing parties. Deeming this to be the correct view, it follows that in our opinion rape and incest are necessarily distinct offenses and should not be charged in the same indictment."

Two judges dissented, and in a dissenting opinion it was said: "In incest and rape the criminal act—the *lexen* of the offenses—is unlawful carnal knowledge of a woman. If it be done by force it is rape; if the woman is within the prohibited degrees of consanguinity or affinity, it is incest. But suppose the act be accompanied both by force and the circumstance of the consanguinity or affinity of the woman, if we leave out of view the force, it is incest; or if we do not consider the relationship of the parties, it is rape. Considering all the attending circumstances, it is a compound offense consisting of both rape and incest, and under the statute cited above, these several offenses may be charged in the same indictment. I conclude that the indictment in this case, one count charging rape and the other incest, was good, and that defendant was properly sentenced for incest upon the verdict on the second count."

"The object of the statute is to prohibit by punishment sexual intercourse between persons within the degree of consanguinity or affinity prescribed. Guilt in this case, as in all other cases, depends upon what the criminal does himself and his intentions; his guilt does not depend upon the guilt of another. As we have seen, the real criminal act which the law punishes is carnal knowledge. This he cannot commit without the woman being guilty."

"There may exist circumstances which will relieve one of the parties from guilt; as imbecility of one, or that the connection was accomplished by force or fraud. The opinion of my brothers seems to admit that in case of fraud the person deceived would be innocent, and the other would be guilty of incest. The same conclusion must be reached in case the connection is accomplished by force, or one of the persons is an imbecile. This conclusion is based upon the thought that the crime depends upon the intention and act of the person charged therewith, and not upon the guilt of another. The guilt of defendant rests upon his own acts. He may have guilty connection with a woman, while she, because of fraud, force, or imbecility, is held innocent by the law."

"The doctrine for which I contend has the support of the following authorities: *Commonwealth v. Goodhue*, 2 Metc. (Mass.) 191; *People v. Rowe*, 2 Mich. N. P. 309; 2 Bish. Crim. Law, § 538; 1 Archb. Crim. Law, 303-310; *Wright v. State*, 4 Humph. 196; *Stephen v. State*, 11 Ga. 225; *Burk v. State*, 2 Harr. & Johns. 428."

In *People v. Jenness*, 5 Mich. 305, followed in *De Groat v. People*, 39 id. 124, it was held that "incest can only be committed by the concurrent act of two persons of opposite sexes; and the assent or concurrence of the one is as essential to the commission of the offense as that of the other."

In *Egbert v. Greenwall*, 44 Mich. 245; s. c., 38 Am. Rep. 260, it was held that an action lies for criminal conversation, although the intercourse was had by violence.

See *Freeman v. State* (11 Tex. Ct. App. 98), 40 Am. Rep.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

FRATT V. WHITTIER.

(58 Cal. 126.)

Fixtures—of hotel.

By a deed of a hotel, "with the appurtenances and improvements thereunto belonging," executed in pursuance of a contract providing that the vendor might remove his furniture, pictures and carpets, but none of the "permanent fixtures and appurtenances," the gas fixtures and fittings, the kitchen range and boiler, a patent water filter, tanks and mosquito screens were held to pass.*

ACTION to recover property claimed as personalty. The opinion states the facts. The defendant had judgment below.

T. B. McFarland and Henry Edgerton, for appellant.

Freeman & Bates, for respondent.

* See *McKeage v. Hanover Fire Ins. Co.* (81 N. Y. 38), 37 Am. Rep. 471, and note, 472. In *Harmony Building Ass'n v. Berger*, Penn. Sup. Ct., Jan. 1882, a Baltimore heater and a weather-vane were held not fixtures, and as to marble counter slabs it was left to the jury.

McKEE, J. This is an action to recover certain gas fixtures, consisting of chandeliers, globes, brackets, burners, pendants, etc., a kitchen range with boiler attached, a patent water-filter, tanks, and mosquito-screens. The property was attached to a building known as the "Orleans Hotel," situate on a lot of land fronting on Second street, in the city of Sacramento.

As owner of the hotel, the plaintiff, on October 15, 1879, contracted in writing to sell the same to the defendant, by the following description, viz.:

"Lot Number 6 in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging." The sale was made for \$28,000, gold coin, payable after an examination and approval of the title, upon receiving from the plaintiff possession of the property and of a deed of grant of the same, on or before the 1st day of November, 1879, reserving to the plaintiff, among other things, the right within ten days after delivery of possession, to remove from the upper rooms of the hotel his "furniture, carpets, and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." On the 25th of October, the defendants, having satisfied themselves about the plaintiff's title, paid the full amount of the purchase-money and received from the plaintiff possession and a deed of grant of the property. The deed described the property the same way that it had been described in the contract of sale, and it also contained the recital that the deed had been made in pursuance of the contract of sale and subject to the terms, conditions, and reservations therein contained.

Within ten days after the delivery of possession plaintiff demanded of the defendants the privilege of removing the articles in controversy from the hotel, which being refused, this action was instituted, and the question arises whether the articles are personalty, or fixtures which passed as appurtenances of the realty by the deed of grant.

If the question arose out of the deed alone, it might not be difficult of solution, for the weight of authority seems to be in favor of the proposition that they are to be regarded as movable property, capable of being severed from the building; yet the authorities upon the subject are conflicting. In *McKeage v. Hanover Fire Insurance Company*, 81 N. Y. 38; s. c., 37 Am. Rep. 471, the Supreme Court of New York held that gas-pipes which run through

the walls and under the floors of a house are permanent parts of the building; but fixtures attached to such pipes, where they are simply screwed on projections of the pipes from the walls, which can be detached by unscrewing them, are not appurtenances, and so do not pass by deed or under a mortgage of the premises, and the mere declaration of the owner that he intends that such articles shall go with the house does not make them realty.

In *Guthrie v. Jones*, 108 Mass. 193, it was held, that as between landlord and tenant, gas fixtures, though fastened to the walls, were not annexed to the realty so as to become part of it. They are, says the court, in their nature, articles of furniture, and the fact that they were fastened to the walls for safety or convenience, does not deprive them of their character as personal chattels and make them a part of the realty.

In *Vaughen v. Haldeman*, 33 Penn. St. 523, the court says: "Lamps, chandeliers, candlesticks, candelabra, screens, and the various contrivances for lighting houses by means of candles, oil, or other fluids, have never been considered as fixtures and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures." In *Jarschi v. Philharmonic Society*, 79 Penn. St. 403; s. c., 21 Am. Rep. 78, the case of *Vaughen v. Haldeman* was reviewed and approved. Says SHARSWOOD, J.: "Houses are considered as finished by the builders when the gas fittings are completed. The fixtures are put up in more or less expensive style, according to the tastes and means of the persons who mean to occupy them, whether as tenants or owners. If the tenant puts them in, it is not denied, that as between him and the landlord, they are his, and he may remove them, or they may be sold as personal property, on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is—fixtures and all—the purchaser is not entitled to them. We see then no reason for departing from the judgment in *Vaughen v. Haldeman*." To the same effect are *Shaw v. Leuke*, 1 Daly, 487; *Montague v. Dent*, 10 Rich. 138; *Rogers v. Crow*, 40 Mo. 91; *Lawrence v. Kemp*, 1 Duer, 363; *Towne v. Fiske*, 127 Mass. 125; s. c., 34 Am. Rep. 353.

On the other hand, it has been held by the Supreme Court of

Kentucky, in the case of *Johnson v. Wiseman*, 4 Metc. (K y.) 357, that where a vendee of a house, in possession, purchased and put into it gas fixtures, chandeliers, etc., which were affixed by means of screws to iron pipes let into the walls of the house for the purpose of conducting gas to the burners, such chandeliers, etc., became fixtures which passed by a deed of the realty, in the absence of any express provision to the contrary, although they may be removable without injury to the walls or the ceiling of the house, or to the pipes to which they are attached. The same doctrine was enunciated in *Smith v. Commonwealth*, 14 Bush, 31; s. c., 29 Am. Rep. 402, as one about which there was no question. Whatever indeed is accessory to a building, for the more convenient use and improvement of the building, is considered to pass by a deed of the premises. Thus, articles placed in a mill by the owner, to carry out the obvious purpose for which it was erected, are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere. *Parsons v. Copeland*, 38 Me. 537. In a building erected as a factory, the steam works relied on to furnish the motive power, and the works to be driven by it, are essential parts of the factory, adapted to be used with it, and would pass by a conveyance of the real estate. *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. Apparatus for the manufacture of gas are fixtures. *Hays v. Doane*, 3 Stock. 84. Gas-burners are of the same character. They are in no sense furniture, but are mere accessories to the building. *Keeler v. Keeler*, 31 N. J. Eq. 191.

What is accessory to real estate, is, according to the rule of the common law, part of it, and passes with it by alienation. That rule has been in the growth of the law greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture, and domestic convenience; and courts recognize and enforce the right of removal by a tenant of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation does not apply as between heir and executor, vendor and vendee. As between the latter the rule of the common law is still applicable, except so far as it may be modified by statutory regulations upon the subject. So that chattels attached to the freehold by the owner, and contributing to its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey. *Tourtellot v. Phelps*, 4 Gray, 378. And after conveyance they cannot be severed by the vendor or any one else than the owner.

Fratt v. Whittier.

As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed, and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash-kettles appertaining to a building for manufacturing ashes (*Miller v. Plumb*, 6 Cow. 665 ; s. c., 16 Am. Dec. 456) ; a cotton-gin fixed in its place (*Bratton v. Clawson*, 2 Strob. 478) ; a steam-engine to drive a brick-mill (*Oves v. Oglesby*, 7 Watts, 106) ; kettles set in brick in dyeing and print works (*Despatch Line v. Bellamy Man. Co.*, 12 N. H. 207) ; iron stoves fixed to the brick work of chimneys (*Goddard v. Chase*, 7 Mass. 432) ; wainscotwork, fixed and dormant tables, engines and boilers used in a flour-mill and attached to it (*Sands v. Pfeiffer*, 10 Cal. 259) ; a steam-engine and boiler fastened to a frame of timber and bedded in a quartz ledge and used for the purpose of working the ledge (*Merritt v. Judd*, 14 Cal. 59) ; a conduit or water-pipe to conduct water to a house (*Philbrick v. Ewing*, 97 Mass. 134) ; hop-poles in use on a hop farm (*Bishop v. Bishop*, 11 N. Y. 123) ; statues erected for ornament, though only kept in place by their own weight (*Snedeker v. Warring*, 12 N. Y. 170). In fact, whatever the vendor has annexed to a building for the more convenient use and improvement of the premises passes by his deed. The true rule deduced from all the authorities, says the Supreme Court of Virginia, seems to be this, that when the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building ; and that whatever is essential for the purposes for which the building is used, will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either. *Green v. Phillips*, 26 Gratt. 752 ; *Shelton v. Ficklin*, 32 id. 735.

Judged by these rules, it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their nature, the circumstances under which they were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself, by his testimony, shows that

the globes were lettered "Orleans Hotel," and that they, with the chandeliers, etc., were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste-pipe which ran through the wall of the building and connected with a sewer in an alley outside, and that the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main, or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito-transoms and window-screens were fitted to the windows and transoms of the hotel—each window and transom-frame being fitted to its particular window, and shoved up and down in it on grooves, and all of them were as necessary to the hotel as its windows, its blinds and shutters. All of the articles were therefore essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, "it would not have been a hotel without them." They were therefore fixtures which passed by the deed of grant to the defendants, unless they were specially reserved by the deed. But the deed reserved none of the articles. It was made, according to its recitals, in pursuance of the agreement of the 15th of October, and subject to the terms, conditions, and reservations therein contained and expressed.

As already stated, the agreement reserved only the furniture, pictures, and carpets of the upper rooms of the building, and none of the "permanent fixtures or appurtenances to the property." In the absence from the deed of any special reservation of the articles, it must be presumed that the parties, by their agreement, considered them as permanent fixtures and appurtenances of the hotel, which were to pass by the deed; it is a well-settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their agreement, courts will enforce it. *Smith v. Waggoner*, 50 Wis. 155; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 id. 377; s. c., 13 Am. Rep. 537; *Ford v. Williams*, 24 N. Y. 359; *Smith v. Benson*, 1 Hill, 176; *Menagh v. Whitwell*, 52 N. Y. 146; s. c., 11 Am. Rep. 683.

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So that the plaintiff, when he contracted to sell the hotel property with its appurtenances and improvements, reserving from the sale only the carpets, furniture, and pictures of the upper rooms of the building, fixed upon all the chattels which he had annexed to the hotel, and which were necessary to its use and enjoyment, the character of appurtenances and improvements of the hotel. None of them by any possibility of construction could fall within the reservation of "furniture, carpets, or fixtures in the upper rooms of the hotel."

The plaintiff therefore sold the articles in question as fixtures with the hotel, and as such they passed by his subsequent deed of the premises to the defendants.

Judgment and order affirmed.

Judgment affirmed.

Ross and McKINSTRY, JJ., concurred in the judgment.

HENDRICKS V. SPRING VALLEY MINING AND IRRIGATION COMPANY.

(33 Cal. 130.)

Mines — lateral support.

The doctrine of lateral support does not apply as between owners of adjoining gold-mining claims, where the process of working is to tear down the soil and wash it.

TRESPASS. The opinion states the facts. The defendant had judgment below.

Jo Hamilton and Gray & Gale, for appellant.

Belcher & Belcher, for respondent.

Ross, J. Plaintiff and defendant owned adjoining mining claims. Which was the prior location does not appear. The claims were what are known as "deep diggings," and such as are worked by the hydraulic process. In mining his own ground the defendant washed away the gravel to a point distant, in one place, seventy feet, and at other places from one hundred to one hundred and

fifty feet from the plaintiff's claim. At these points the bank was deep, and the result was that it caved ; and in doing so, a portion of the surface of the plaintiff's claim gave way and fell on the ground of the defendant. This portion contained a small amount of gold-bearing gravel, a part of which the defendant washed away, but the value of the gold extracted therefrom was much less than the necessary cost of extracting it.

Some time after the defendant ceased to work its ground near the plaintiff's line, large portions of the surface of the plaintiff's claim caved and fell upon the adjoining ground of the defendant, where it still remains. All of the caving was caused by the mining done by the defendant, but it is not claimed that the defendant's work was performed in a careless or improper manner. The question in the case is, whether the doctrine of lateral support applies to cases like the present. We think not. The very purpose of locating the ground, both on the part of the plaintiff and the defendant, was to tear it down and wash it away. Its only value consisted in the gold it contained. To apply the doctrine contended for by the appellant to ground of this character, would therefore to a great extent defeat the very purpose for which it was located.

Defendant would be liable for the amount of gold taken from the gravel that fell from the plaintiff's claim, but for the fact that its value was less than the necessary cost of extracting it. *Maye v. Tappan*, 23 Cal. 306 ; *Goller v. Fett*, 30 id. 481.

Judgment and order affirmed.

Judgment affirmed.

McKINSTRY and McKEE, JJ., concurred.

PEOPLE V. FEILEN.

(38 Cal. 218.)

Criminal law — bigamy — evidence.

In a prosecution for bigamy there can be no conviction where the evidence as to the first wife showed only that she was alive three years before the second marriage.

CONVICTION of bigamy. The opinion states the case.

People v. Feilen.

W. A. Johnston, for appellant.

A. L. Hart, attorney-general, for respondent.

THORNTON, J. The defendant was convicted of bigamy, moved for a new trial, which was denied, and judgment was rendered and entered upon the conviction. This appeal is prosecuted from the order denying a new trial, and from the judgment.

On the trial, testimony of a witness was offered and stated that defendant had admitted to him in 1875 or in 1876 that he had left a wife with four or five children in Chicago ; that she was sick and couldn't stand a voyage to California. Another witness testified that a person stated to him in 1875, in a conversation had in the presence of defendant, that he (defendant) had a wife and five children in Chicago, and that his wife was sick ; that the defendant said nothing in relation to this statement made in his presence ; that defendant told him several times that he had a family in Chicago ; that "the last time defendant referred to his family in Chicago was — can't say exactly — about two or three years ago. Said his wife was sickly." A third witness testified that he saw defendant in his office in 1875. This witness proceeded to state : "He (referring to defendant's statements) said times were poor in Chicago ; he had a wife and four or five children. He spoke of his family after that — showed me likenesses of children. He spoke of his family the last time about 1878. I couldn't place the date very well." This witness also stated that he introduced defendant to one Habisch ; that "defendant explained to Habisch that he had a wife and family in Chicago, and wanted to raise money and bring them to California. This was in 1875." The officer who arrested the defendant was called and testified that defendant told him after the arrest that he had a wife and four children, but had not heard of them for four or five years ; that he was not certain, but think he said in Chicago. Of this last statement as to the place he was not positive ; that there was no threat or inducement offered him to make this statement. The above is all the testimony bearing on the issue as to the wife of the alleged first marriage being alive when the second marriage occurred.

As to the second marriage, it was admitted at the trial that it took place in San Jose, in this State, in the month of July, 1880, with Dora Max, the person named in the information, and that de-

fendant and Dora Max had lived together as husband and wife since the date just above given in San Jose.

In a trial on an indictment or information for bigamy, to make out a case on the part of the prosecution the *first* and *second* marriages must be proved, and it must also be proved that the former husband or wife *was alive* when the second marriage was entered into. In this case, it was necessary to prove that the former wife was living in July, 1880, when it is admitted a marriage was celebrated between Dora Max and the defendant.

The court instructed the jury in accordance with the law as above laid down. On the issue of the first wife being alive it directed the jury in these words : " It is claimed upon the part of the defendant in this case that there is no proof before the jury that this former wife, if wife she were, or if such relation did exist, was in fact living at the time the second marriage was contracted. It is for the jury to determine of that fact, as they do of the other, whether a marriage did in fact exist. The law presumes, when a fact is shown once to exist, its continuance under certain circumstances and for certain lengths of time ; with reference to some matters it is made conclusive, and in cases of this character the absence of one of the parties to a marriage, unheard from for a period of five years, is a sufficient justification of the party entering into a new marriage relation, and will avoid the consequences of a criminal prosecution for bigamy. This knowledge and this absence must continue for this five years before the statute will protect him. Independent however of this particular and specific defense that the statute gives, it is for the jury to determine from all the circumstances of the case, whether this woman alleged to be the wife of the defendant was in fact living at the time that he contracted the alleged second marriage. That is a matter which you have to determine from those presumptions of law and of fact which characterize persons in that condition and situation, which you find these parties to have maintained. It is a question of fact dependent upon the probabilities and presumptions that may be before you as to character, condition, and situation of this woman."

By this language the jury was in effect directed that in determining whether the wife of the former marriage was living when the second marriage took place, they might act upon the rule of law that when a fact is once shown to have existed, the law presumes its continuance ; and since it has been shown that the former wife

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was alive two or three or four years prior to the second marriage, the law presumes that she continues to live, upon which presumption of law they were authorized to act in determining whether the former wife was living at the time of the second marriage.

The portion of the charge above quoted was excepted to. Did the court err in so directing the jury? We proceed to examine this question.

In a prosecution for bigamy the law presumes the innocence of the defendant until the contrary is shown. The law also presumes the existence of a person once established by proof to continue until the contrary is shown or until a different presumption arises. "Thus, where the issue is upon the life or death of a person once shown to have been living, the burden of proof lies upon the party who asserts the death. But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is on the other party." 1 Greenl. Ev., § 41.

Mr. Greenleaf states, in the same section, that this period of seven years was inserted after great deliberation, in the British statute of bigamy and the statute of leases concerning lives and has since been adopted from analogy in other cases. See cases cited in note by Mr. Greenleaf. The period of five years is inserted in our statute of bigamy, and thus with us in such a prosecution as this the presumption of life ceases at the end of five years. The language in which the rule as to each presumption is stated shows that they are disputable.

Now assuming that it was proven the first wife was living—five years not having elapsed—there are then two presumptions, the one of innocence operating in favor of defendant, and the other of the continuance of life from the proof of prior existence operating against him. Which should obtain, and be adjudged superior? Should one be held superior to the other? and if so, which one? The rule as declared by Mr. Bishop (see Bishop on Stat. Crimes, § 611) is that they should be held to neutralize each other, and the issue as to the continuance of life from the proof of prior existence should be left to the jury as a naked matter of fact, divested of any presumption of law.

The judgment in *Queen v. Lumley*, L. R., 1 C. C. Res. 196, sustains this rule, and in fact goes further, and holds that the law makes no presumption that a person continues to live, from the

proof of his or her existence at a former date. In that case, which was a prosecution for bigamy, the facts were as follows: The prisoner married one Victor at St. Helier's, in the Island of Jersey, in the year 1836, and lived with him in England until the middle of 1843, when they separated, and she was taken by her parents back to Jersey, where she resumed her maiden name. On the 9th of July, 1847, she describing herself as a spinster, married Lumley, with whom she lived until March, 1864. Nothing was heard of Victor from the time the prisoner left him in 1843. No evidence was given of the age of Victor, nor any of the age of the prisoner, except that a witness, who stated she was forty-eight years old, said that the prisoner was her senior. The learned judge (LUSH), before whom the trial was had, directed the jury that there being no circumstances leading to any reasonable inference that he had died, "Victor must be presumed to have been living at the date of the second marriage." The question whether this direction was right or not was reserved for the opinion of the court. The case was argued before a court composed of KELLY, C. B., CLEASBY, B., BYLES, LUSH, and BRETT, JJ. LUSH, J., delivered the opinion of the court. He said: "We are of opinion that the direction to the jury in this case (stating it as given above) was erroneous. In an indictment for bigamy it is incumbent on the prosecution to prove, to the satisfaction of the jury, that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Reg. v. Twynning*, 2 B. and Ald. 386; *Reg. v. Harborne*, 2 A. and E. 540, and *Nepean v. Doe d. Knight*, 2 M. & W. 894, appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the act (24 and 25 Vict., ch.

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100, § 57) then comes into operation, and exonerates the prisoner from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The legislature by this proviso sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz.: that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That as we have said, is always a question of fact."

Our statute is substantially the same, as far as relates to the point under consideration, as the 24 and 25 Victoria, referred to above.

In re Phene's Trusts, L. R., 5 Ch. App. Cas. 139, the question whether there was any presumption of law that a person continued to live arising upon proof of prior existence was very fully discussed and it was held that the law makes no such presumption. This was held to apply to civil and criminal cases alike. This question was also discussed at length by FIELD, J., in a case (*Montgomery v. Bevans*, 1 Sawy. 666) tried before him in the United States Circuit Court for California. He reviewed several of the English cases considered in *In re Phene's Trusts*, as well as this case, and came to the conclusion that the law as declared in England in the case of *Phene's Trusts*, was different from the law which obtains in this country; stating at the same time that when this presumption of the continuance of life conflicts with the presumption of innocence, the latter prevails. In the opinion delivered in the case referred to, the learned justice says: "But the law as thus declared in England is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead, but here the law, differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred, that is, at the end of seven years. And the presumption of life is received, in the absence of any countervailing testimony, as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails." *Montgomery v. Bevans*, 1 Sawy. 666. The rule thus stated as to

these conflicting presumptions by FIELD, J., is sustained by *Reg. v. Twynning*, 2 B. & Ald. 385.

Whichever of the rules appearing from the foregoing is adopted, the portion of the charge above quoted is erroneous. By the portion of the charge referred to, the jury were told that in the determination of the issue as to the continued life of the first wife, they might call to their aid the presumption of law indicated in the words quoted from the charge. The issue on this point should have been left to the jury to be determined, as a matter of fact, upon such reasonable inferences as the evidence supplied, free from any presumption of law.

It is further contended by the appellant that the verdict is contrary to the evidence. This is one of the grounds on which the motion for a new trial was made. We do not think that a verdict of guilty on this evidence in regard to the first wife being in existence when the second marriage was had, should stand. The evidence, taking the strongest view of it against defendant, proved that the first wife was living about three years prior to the day of the second marriage. We lay out of view what defendant is proved to have stated as to "his family." This expression may have referred only to his children, and he may have used this language in regard to a family of children, surviving his wife. It can not be fairly regarded as an admission by him that the first wife was then living. The word family in common discourse is frequently applied to children alone. There is no testimony as to the age of the first wife, a most material circumstance to be considered in passing on this point. We can not perceive that this evidence furnished a reasonable inference that the first wife was alive in July, 1880, so as to establish the guilt of the defendant beyond a reasonable doubt. In our judgment, the verdict is not sustained by the evidence, and a new trial should have been granted on this ground. We are also of opinion that the court should have advised the jury, when the prosecution rested, to acquit the defendant.

[Omitting a point of pleading.]

Judgment and order reversed and cause remanded.

Reversed and remanded.

SHARPSTEIN, J., MORRISON, O. J., and MYRIOK, J., concurred.

Veerkamp v. Hulburd Canning and Drying Company.

VEERKAMP V. HULBURD CANNING AND DRYING COMPANY.

(58 Cal. 229.)

Contract — part delivery — time of payment.

The defendant agreed to buy all the fruit raised by the plaintiff and delivered at its works, at a uniform price per pound. As it ripened the plaintiff delivered and the defendant accepted quantities from time to time, but declined to pay for any until the whole was delivered. The plaintiff discontinued delivering and sued for the price of that delivered. *Held*, maintainable.*

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

George G. Blanchard, for appellant.

C. J. Carpenter, for respondents.

Ross, J. The parties to this suit contracted with each other in writing as follows: "The said company engage to take and pay for all the fruit raised by the said Francis Veerkamp at the uniform rate of five-eighths ($\frac{5}{8}$) of a cent per pound for all fruit raised and delivered at the works of the above company, in Upper Placerville (excepting Mission grapes), and to furnish boxes for picking and hauling the fruit. The said Francis Veerkamp, on his part, engages to deliver the fruit in good condition, and when in suitable ripeness, and will sell no fruit to other parties, excepting one load early."

The parties could not very well have made their contract more indefinite. The fruit referred to in the written agreement was such as was then growing on land of the plaintiff. As the fruit ripened, the plaintiff delivered and the defendant received it under the contract. After a part had been thus delivered and accepted, the plaintiff demanded of defendant payment for that delivered at the agreed rate, but the defendant refused to make such payment until the plaintiff should first deliver all of the fruit referred to. Thereupon plaintiff declined to deliver to defendant any more, and sued for the value of that delivered and accepted. The defendant resists the action on the ground that the delivery of all the fruit referred to in the contract was a condition precedent to the payment for any. We do not think that the proper construction of

* See to same effect, *Avery v. Wilson* (81 N. Y. 341), 37 Am. Rep. 503.

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the agreement between the parties. The contract must be construed with reference to the subject-matter of it. It was executory in its nature. It could not be known in advance how much of any particular kind of fruit there would be. In the nature of things it ripened at different times, and had to be delivered at different times. The contract fixed the rate per pound at which the defendant was to pay for it, and in our opinion, according to its true construction, as each lot was delivered to and accepted by defendant there became due and payable from it to the plaintiff the value thereof at the rate per pound fixed in the contract.

Judgment affirmed.

McKINSTRY and McKEE, JJ., concurred

BEAUCHAMP V. ARCHER

(58 Cal. 481.)

Sale — payment — rescission.

The plaintiff agreed to buy of the defendant the cattle of a certain brand, then running in the defendant's herd, but of an uncertain number, at a fixed price per head, and paid down a certain amount, but no time was fixed for delivery or completing the payment. The plaintiff notified the defendant that he would receive the cattle on a certain day, and on that day the defendant tendered the cattle, and the plaintiff offered in payment a check payable two days after sight. The defendant refused to except anything but cash, and declined to deliver the cattle. Some days afterward the plaintiff tendered the balance of the price, and later on the same day the defendant tendered the part paid. Both tenders were refused, and the plaintiff brought replevin. *Held*, not maintainable.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

W. J. & Wm. Graves and Earnest Graves, for appellant.

W. H. Spencer, J. W. Turner and Craig & Meredith, for respondent.

Ross, J. On the 1st of April, 1880, the plaintiff contracted with the defendants for the sale by the latter to him of a lot of cattle of certain brands, which were then running with a large herd on their rancho. The price agreed upon was twenty-two dollars and

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fifty cents per head for the steers, and twenty dollars per head for the heifers ; and plaintiff paid to defendants two hundred and fifty dollars on account of the purchase-price. At the time of the contract neither plaintiff nor defendant knew how many cattle there would be of the description agreed on, nor was there any time fixed for the ascertainment of that fact or the delivery of and payment for them. On the 27th of May plaintiff notified the defendants that he would receive the cattle on the succeeding day, May 28th ; and on that day went, with two employees, to the defendants' rancho for that purpose. Plaintiff and defendants then got together the entire herd, consisting of two hundred and fifty head, out of which they selected those of the description mentioned in the contract, numbering twenty-six in all, and consisting of twenty-two steers and four heifers. When the twenty-six were so separated they were agreed upon as the cattle contemplated by the contract of April 1st. The parties then ascertained by computation that the balance of the purchase-price was three hundred and twenty-five dollars, and the defendants thereupon tendered the plaintiff the cattle and demanded of him payment of that sum. The plaintiff did not have the money, but offered the defendants a check for the amount on Grant, Lull & Co., payable two days after sight. Defendants refused to take the check in payment, and told the plaintiff if he did not pay them the money for the cattle they would turn them back with the herd — whereupon the plaintiff asked defendants to hold the cattle until he could go to Cambria (a distance of twenty miles) and get the money for them, or that defendants accompany him on the road with the cattle and he would get the money at Cambria, or sooner if he could. The defendants having refused to accede to either of these propositions, the plaintiff left and the defendants turned the twenty-six head of cattle back with their herd. Several days afterward, to wit, on the 2d day of June, the plaintiff returned to the defendants' rancho and there tendered them three hundred and twenty-five dollars, and demanded possession of the cattle. The defendants refused to accept the money or to make the delivery, and subsequently, but on the same day, offered to the plaintiff the two hundred and fifty dollars, received by them at the inception of the contract. This the plaintiff refused to take, and afterward instituted this action to recover possession of the twenty-six head of cattle, or their value.

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It is quite evident that the contract of April 1st was executory in its nature, and that a property in the subject-matter of it did not then pass to the plaintiff; for it was not then known by either party what or how many cattle in defendant's herd would come within the description agreed on. All this was a matter of future ascertainment. By the contract the time for their identification was not fixed, nor was any thing said about the time of the delivery or of the payment of the balance of the purchase-price. In such cases the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. *Benj. on Sales*, 438, 499; 2 *Kent Com.*, side p. 496. When therefore the plaintiff went, in accordance with the previous notice given by him, to the defendants' rancho, for the purpose of receiving the cattle, he should have gone prepared to pay the balance of the purchase-money; for the part payment made by him at the time of entering into the contract did not operate to invest him with a property in the cattle, and the right of the defendants to have the whole purchase-money paid before they parted with the possession, left them at liberty to rescind upon the failure of the plaintiff to comply with his part of the agreement. *Neil v. Cheves*, 1 *Bail. (S. C.)* 539; *Pickett v. Cloud*, id. 362; *Civ. Code*, § 1749. The plaintiff no doubt supposed that the defendants would take the check on Grant, Lull & Co., payable two days after sight, but they were not bound to do so; nor were they legally bound to go with him to Cambria for the money, or to wait until he could go there for it. The plaintiff himself fixed the time for the selection and delivery of the cattle, to which the defendants agreed, and the law imposed upon him the duty of being prepared to pay the money. *Benj. on Sales*, 449, 524; 2 *Kent Com.* 496-7. Having failed to comply with his part of the agreement, the defendants were at liberty to rescind the contract, which of course involved the return of the money they received under it. This right of rescission on their part was not defeated by the tender made by the plaintiff subsequent to his default, at which time the cattle in controversy were returned to the herd, the gathering of which, in the first instance, according to the findings of the Court, consumed four hours, and would consume the same period a second time, besides entailing damage to the herd to the amount of twenty-five dollars.

Judgment reversed and cause remanded.

McKINSTRY and McKEE, JJ., concurred.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

STATE V. SIMPSON.

(28 Minn. 66.)

Criminal law—former conviction fraudulently obtained.

A criminal conviction fraudulently obtained by the offender is no bar to a subsequent prosecution for the same offense. *

CONVICTION of assault and battery. The opinion states the facts.

Koon, Merrill & Keith, for appellant.

W. J. Hahn, attorney-general, for State.

CLARK, J. A conviction of a criminal offense, fraudulently obtained by the offender, for the purpose of protecting himself from further prosecution and adequate punishment, is no bar to a subsequent prosecution for the same offense. This rule is acquiesced in as just and necessary to the proper administration of public justice. It is claimed however that the evidence introduced in the muni-

* To same effect, *Watkins v. State* (68 Ind. 427), 34 Am. Rep. 272.

cial court, which consisted solely of the record of the former conviction, did not show that the defendant was actuated in procuring such conviction by fraudulent motives ; and stress is laid upon a stipulation of counsel, made at the trial, to the effect that no actual fraud, either on the part of the justice of the peace before whom the former conviction was had, or of the defendant, could be shown.

The record of the former conviction showed the following as the entire proceedings : On the 27th day of August, 1880, at 11 o'clock in the forenoon, the defendant complained on oath, before a justice of the peace in the village of Excelsior, of himself, for an assault and battery committed the same day upon William B. Morse, and was thereupon ordered by the justice to consider himself under arrest without a warrant. The defendant was then sworn as a witness, and testified to the fact and character of the assault and battery. He then pleaded guilty, but begged the mercy of the court, whereupon the justice imposed upon him a fine of six dollars and costs, — fifty cents — which he paid, and was thereupon discharged. The court below was entirely correct in overruling the plea of former conviction, upon the facts disclosed by this record. In a matter like this there could be no reasonable expectation of proving fraud otherwise than by the proceedings themselves, and a plain inference of a fraudulent purpose arises from them. When a man has violated the law, there can certainly be no objection to his voluntarily surrendering himself to the officers of the law, to be prosecuted in due form, and visited with the penalty of its infraction. But the proceeding which the defendant set in motion was in no proper sense a prosecution, nor was it calculated to bring out the character of the offense, or to make appear the just and proper measure of its punishment. The State was not represented by any officer to prosecute in its behalf, nor even by the injured party. The entire basis of the action of the justice was the statement on oath of the offender. It is plain to be seen that the proper administration of public justice would be endangered, if a proceeding of this character should be effectual to protect the offender from a prosecution in which the State and the injured party could be represented and heard.

Judgment affirmed.

Hersey v. Bennett.

HERSEY v. BENNETT.

(28 Minn. 88.)

Payment — application of — security.

Where a debtor makes voluntary payments on a continuous account of several items, forming but one debt and neither party makes any special application, the law will apply them according to priority of time; and the rule is not changed although there may be a resulting trust in favor of the creditor available for the satisfaction of the earlier items but not for the later.

ACTION to declare a trust in real estate. The opinion states the case. The defendant had judgment below.

Daniel Rohrer and M. J. Severance, for appellants.

Emory Clark, for respondents.

MITCHELL, J. The plaintiffs are judgment creditors of the defendant W. R. Bennett. As such, they bring this action to reach, for the purpose of satisfying their judgment, lots 11 and 12, in block 6, in the village of Worthington, the legal title to which is in the defendant, Lillie L. Bennett, wife of her co-defendant, and to have a trust declared in their favor in this property to the amount necessary to satisfy their judgment, pursuant to the provisions of Gen. Stats. 1878, ch. 43, §§ 7, 8, which are as follows: "Section 7. When a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result in favor of the person by whom such payment is made, but the title shall vest in the person named as alienee in such conveyance, subject only to the provisions of the next section.

"Section 8. Every such conveyance shall be presumed fraudulent as against the creditors, at that time, of the person paying the consideration; and when a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands."

The facts as found by the court below, so far as material to the decision of the case, are substantially these: In July, 1875, plaintiffs commenced to sell and deliver lumber from time to time to Bennett & Stone, a firm composed of defendant, W. R. Bennett and one Daniel Stone, the amounts being charged as delivered to their ac-

count. Bennett & Stone made payments from time to time, which plaintiffs credited generally on account, neither party making any application to any specific items. In June, 1877, Stone retired from the firm, and the business was continued by Bennett alone, and the balance then ascertained due from Bennett & Stone was charged to Bennett individually. The dealings between plaintiffs and Bennett continued to be conducted precisely as with Bennett & Stone until March, 1878, when Bennett, with consent of plaintiffs, entered into partnership with one Grissell, and the general balance on account then ascertained due from Bennett, by consent of parties, was charged by plaintiffs to the account of Bennett & Grissell. Business was thereafter continued and conducted between plaintiffs and Bennett & Grissell precisely as before; each item of lumber sold by plaintiffs being charged on the general account, and all payments made by Bennett & Grissell being made and credited on general account. In July, 1878, the account was settled between the parties, and the promissory notes of Bennett & Grissell taken by plaintiffs for the general balance then ascertained, amounting to some \$12,000. These notes were all paid except one note for \$4,000, for which a new note of Bennett & Grissell was taken in October, 1878, which last note is the foundation of the judgment for the satisfaction of which the property referred to is sought to be reached.

It clearly appears, and is in substance so found, that the entire dealings between plaintiffs and W. R. Bennett, and the firms of which he was a member, constituted but one continuous account, and were so treated by the parties, and that all of the payments made during this time were made and received on general account, and not appropriated by either party upon any specific items of that account. The lots above described were purchased by the defendant W. R. Bennett, who paid the consideration entirely out of his own funds, but caused the conveyances thereof to be made to his wife, Lillie L. Bennett. Lot 11 was so purchased and conveyed January 8, 1876, and lot 12, May 1, 1876. Between the dates of these conveyances and the month of August, 1876, W. R. Bennett made improvements on these lots to the amount of some \$2,500, and paid therefor wholly out of his own means. No facts were found or proved that would render these conveyances fraudulent as against subsequent creditors of Bennett. The aggregate amount of payments made on the account exceeds the entire aggregate of

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the items on the debit side of the account up to May 1, 1876, the date of the last conveyance to Lillie L. Bennett, and including the amounts paid by Bennett & Grissell, exceeds (if that be material) the aggregate of the debit side of the account up to August, 1876, when the improvements on the premises by Bennett were completed.

To maintain this action, and entitle them to the relief sought, plaintiffs must establish the fact that their claim, which is the foundation of their judgment, was an existing claim at the date of one or both of the conveyances to defendant Lillie L. Bennett. From the facts stated, it will be apparent that the determination of that fact will depend upon the order in which the law will apply the payments upon this account. Will it apply them as defendants claim, in the order of time,—that is, to the extinguishment of the earlier items first, or should they be appropriated, as plaintiffs insist, to the later items first, and thus preserve their standing as existing creditors at the date of the conveyances?

The general rule governing the appropriation of payments where the parties have not made it, is “that the court will direct it according to the justice and equity of the case.” In this form it is rather the enunciation of a principle than of a rule for practical application. In attempting to state the rule, courts have often used general and vague expressions; as for example: “The application becomes the duty of the court, and in its performance a sound discretion is to be exercised;” or “the law will apply payments according to its notions of justice;” or again “on equitable principles,” and “so as to effectuate justice,” and “according to the intrinsic justice and equity of the case.” If these expressions are to be accepted as criterions for judicial action, the rule would become, as well remarked by one, as varying and uncertain as the famous “chancellor’s foot” rule. Such a state of law would be opposed to all correct notions of judicial action. It is true, that where the parties have not made any specific application of payments, courts will make it according to the justice and equity of the case; but in doing so they are governed by certain general and established rules, and are not at liberty to adopt their own notions of what may be just and equitable in each particular case. *Miller v. Miller*, 23 Me. 22; *Bobe v. Stickney*, 36 Ala. 482. And one of those rules is: “In case of payments, where no appropriation is made by either party, and there is but one continuous account of

several items, the payments will be applied on the account according to the priority of time; that is, the first item on the debit side is discharged or reduced by the first item on the credit side."

This rule was settled in the leading case of *Devaynes v. Noble*, 1 Mer. 572, commonly known as *Clayton's case*, and has since been followed by every court in England and America which has had occasion to consider the question. This was a case of a bank account, where all sums paid in formed one blended fund, the different items of which had no longer any distinct existence. In deciding the case, the master of the rolls says (p. 608): "In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. Where there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backward, and strike the balance at the head instead of the foot of it."

In *Bodenham v. Purchas*, 2 B. & Ald. 39, a court of law followed the rule laid down by the master of rolls in the *Clayton* case. In *Field v. Farr*, 5 Bing. 13, it was said that the rule laid down in the *Clayton* case had received the sanction of every court in Westminster Hall. The same rule was followed in *Pemberton v. Oakes*, 4 Russ. 154. The same rule has been extensively adopted by the courts of this country, both directly and by way of analogy. When frequent settlements of accounts, with debit and credit, are made between the parties, and balances carried forward to new accounts, and no appropriation has been expressly made by the parties (precisely this case), the law will appropriate the credits to the extinguishment of the oldest charges. *McKenzie v. Nevius*, 22 Me. 138. This rule will be applied without reference to the fact that one item is better secured than another, where, as in this case, the different items have been blended together in one common account, and have no longer any separate existence, and the general balance only is considered due.

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Harrison v. Johnston, 27 Ala. 445; *Truscott v. King*, 6 N. Y. 147. In this last case, it is said that it satisfactorily appeared that the parties had manifested an intention of making such an application. But the court also says that there was no direct evidence of such intention, but the manner of keeping the accounts between the parties, and ascertaining the balance due from time to time, indicated the intention,—precisely what appears in the present case. See also *Crompton v. Pratt*, 105 Mass. 255; *Hill v. Robbins*, 22 Mich. 475; *Miller v. Miller*, 23 Me. 22; *Cushing v. Wyman*, 44 id. 121; *United States v. Kirkpatrick*, 9 Wheat. 720. The only exception or modification of this rule is, that being founded on the presumed intention of the parties, it will not be applied where the evidence clearly shows a different intention, as in *Dulles v. De Forest*, 19 Conn. 190. Cases where the older items were barred by the statute of limitations, as in *Livermore v. Rand*, 26 N. H. 85, or are illegal, as in *Solomon v. Dreschler*, 4 Minn. 278, are apparently, but not really, exceptions to the rule. For a fuller citation of authorities on this subject see Munger on Payments, 102, *et seq.*, also notes on the *Clayton* case, 1 Tudor's Lead. Cas. 1; *Field v. Holland*, 1 Am. Lead. Cas. 271.

The plaintiffs insist however that a different rule obtains where the earlier items are secured, and the later ones unsecured, or where, as in the present case, a creditor would have recourse to a certain fund or to certain property for the satisfaction of the earlier items, which he could not reach for the satisfaction of the later items, that in such cases the law will, for the benefit of the creditor, apply the payments upon the later items. In the case of separate and independent debts, such a rule will be applied in favor of creditors having a controlling equity; but we find no well-considered case in which such a rule is applied to an open current account, the items of which do not form distinct debts, but are blended together in one account, so that only the general balance is considered due, and the payments have been made and received on general account. In the cases of *Bodenham v. Purchas*, *Pemberton v. Oakes*, *Harrison v. Johnston*, *Truscott v. King*, *Crompton v. Pratt*, *Miller v. Miller*, and *Cushing v. Wyman*, cited *supra*, the creditors had security for the earlier items which they had not for the later items, or at least would have had recourse to some fund or property for the satisfaction of the earlier items which they could not reach for the later items; and yet this fact was never considered as a controlling equity which would take a case out of the general rule.

The case of *Miller v. Miller*, *supra*, is not only analogous in principle, but is also almost identical in facts with the case at bar. In that case the Supreme Court of Maine held that it could not depart from the general rule, even to enable a creditor to contest a conveyance alleged to be fraudulent as to creditors, but must apply the payment in extinguishment of the oldest items instead of the most recent. The cases cited by plaintiff from this court do not sustain his position. *Solomon v. Dreschler*, 4 Minn. 278, simply holds that where part of the items are illegal, the payment will be applied to those that are legal. *Lash v. Edgerton*, 13 Minn. 210, simply adheres to the well-known rules that where both principal and interest are due on the same debt, the law will apply the payment first upon the interest. The only case cited which seems to favor a contrary rule is that of *Schuelenberg v. Martin*, 2 Fed. Rep. 747. In that case the court seems to base its decision mainly upon that of *Field v. Holland*, 6 Cr. 8. But an examination of this case will show that it was not a case of one continuous account constituting one debt, but of several distinct and separate accounts or debts. Moreover in the case of *Schuelenberg v. Martin*, the payment was not a voluntary payment by the debtor, but a payment by the law, to wit, a dividend out of the assets of an estate, by an administrator, under directions of the Probate Court,—a distinction not alluded to by the court who decided the case. The rule of appropriation of payments first to the earlier items of an account, being founded upon the presumed intention of the parties, applies with especial force to voluntary payments. A distinction has sometimes been made between voluntary payments and payments made by law, where the presumption of intention is wanting, and the appropriation is therefore purely judicial. 1 Am. Lead. Cas. 283. But whether this distinction is well taken it is not necessary to decide.

It is also contended that the defendant Lillie L. Bennett, who is a stranger to these transactions, and claims merely under a voluntary conveyance, cannot be heard in the matter of the application of payments. It is true she has no controlling equity that will entitle her to interpose to have the payments applied to her advantage, in a manner different from that which would obtain between the debtor and the creditor. This is all that is meant by the authorities cited to the effect that third parties, without equities, have no power of action or dictation in the premises.

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Our conclusion therefore is that under the facts of this case the payments must be applied in the order of time to the satisfaction of the older items of the account first. This would extinguish all the items of plaintiffs' account in existence at the dates of either or both of the conveyances of these premises to Lillie L. Bennett, and leave them in the position simply of creditors whose claim accrued subsequently to these conveyances. Therefore they are not in position to ask that a trust be declared in their favor in these premises. This being decisive of the case, it does not become necessary to consider any of the other questions discussed by counsel.

Judgment affirmed.

Judgment affirmed.

BUTLER V. WINONA MILL COMPANY.

(28 Minn. 205.)

Master and servant — contract for compensation.

Under a contract by a master to pay a servant what the master thinks right after the services are performed, the measure fixed by the master is presumptively the measure of compensation, and although considerably less than the reasonable value of the services, it is still conclusive in the absence of proof of fraud or bad faith.*

ACTION on contract. The opinion states the case. The plaintiff had judgment but appealed.

Berry & Morey, for appellant.

Wilson & Gale, for respondent.

CLARK, J. It appears from the findings of fact in this case that the plaintiff performed services for the defendant corporation, under a contract whereby "it was agreed that plaintiff was to enter the service of the defendant in superintending the mason work of a mill, about to be erected by it, and the amount of the plaintiff's compensation therefor was to be left entirely to the defendant to determine and fix, after the services were performed, at such price and amount, as under all the circumstances it (defendant) should

* See *Miller v. Cuddy* (43 Mich. 273), 28 Am. Rep. 181.

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consider right and proper." It further appears from the findings "that after such services were completed, and before the action was brought, the defendant determined and fixed upon the sum of two and a half dollars per day as the amount of plaintiff's compensation, and as the amount and price thereof, which under the circumstances it (defendant) considered right and proper." The further fact is found that the services were reasonably worth four dollars per day. The court below gave judgment for the amount of the compensation at the rate of two and a half dollars per day. The plaintiff claims that he was entitled to a judgment at the rate of four dollars per day.

We think the judgment, as rendered, is correct. The contract was clear and unambiguous. The stipulation that the amount of the compensation should depend upon the judgment and decision of the employer may have been an undesirable one for the plaintiff to consent to ; but he nevertheless chose to accept the employment on those terms. The contract was an entirety, and of obligation in all its parts, and the law cannot, after it has been executed, relieve the plaintiff from the consequences of one of its stipulations, which proves to be disadvantageous to him. That would in effect be making a new contract for the parties.

It was the duty of the defendant to determine and fix the amount of the compensation honestly and in good faith, and if it did so fix it, the obligation of the contract was fulfilled so far as that matter is concerned. It is not alleged in the pleadings nor found in the decision that the defendant acted fraudulently or in bad faith, and fraud or bad faith is not to be presumed. The mere fact that the defendant fixed the compensation at an amount considerably less than the learned judge of the trial court found, upon the evidence before him, the services were reasonably worth, is not of itself sufficient to justify an inference of fraud or bad faith.

[Omitting a question of pleading.]

Judgment affirmed.

Flynn v. Messenger.

FLYNN V. MESSENGER.

(28 Minn. 208.)

Marriage—agency of wife for husband.

A wife engaged a seamstress to do work in her husband's family, agreeing on the amount of wages, but not stating who was to pay her, the seamstress knowing that she was married. While the work was going on the wife told the seamstress that she had property of her own which she was going to sell, and when she sold it she would pay her, and she did afterward pay her a small sum on account. *Held*, that no action would lie against the wife.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

McMillan & Beals, for appellant.

Williams & Davidson, for respondent.

CLARK, J. By the common law, a married woman living with her husband is presumed to have authority from him to order such things as are ordinarily required for family use. The rule is laid down by Lord ABINGER, in *Emmett v. Norton*, 8 C. & P. 506, in these words: "Where a wife is living with her husband, and where, in the ordinary arrangements of her husband's household, she give orders to tradesmen for the benefit of her husband and family, and these orders are proper and not extravagant, it is presumed that she has the authority of her husband for so doing. This rule is founded on common sense, for a wife would be of little use to her husband in their domestic arrangements if she could not order such things as are proper for the use of a house, and for her own use, without the interference of her husband. The law therefore presumes that she does this by her husband's authority."

There can be no doubt (especially under the statutes of this State, conferring upon a married woman the power to transact business, and make contracts which shall bind her) that it is perfectly competent for the wife to bind herself personally to the payment for such orders; but if the party dealing with her knows she is a married woman, living with her husband, and the order is of a character to indicate that it is intended for the benefit of the family, he is bound to presume that she is acting for her husband, and not

on her own account, and cannot hold her personally liable unless she expressly agrees to become so. The principle is laid down in *Powers v. Russell*, 26 Mich. 179, in the following language: "Now, if he (the tradesman) knew that she was a married woman, living with her husband, and the goods were not of a character to indicate that they were bought for other than family use in the husband's family, and she did not claim affirmatively to be purchasing them on her individual account, the natural inference would be that she was purchasing them on her husband's account, and for the use of his family; and she could not be made individually liable without an express agreement to become so, or that the goods should be charged, or the credit given, to herself."

We do not think the statutory provisions regulating the rights and liabilities of married women have changed the obligation of the husband to support and maintain the family, nor taken away from the wife the presumption of authority, arising out of the marital relation, to act in his behalf in supplying the ordinary wants of his household. We have been referred more especially to Gen. Stats. 1878, ch. 69, § 3, as changing the common law so as to make the wife individually liable for goods ordered by her for domestic use, unless she has express authority from her husband, and makes the purchase expressly on his account; but we do not think its scope is so broad. If it was intended to make so important a change in the law and the usages of society, it is to be presumed that the legislature would have declared it in express terms, and not left it to be brought about by implication from other provisions, not directed to the rules of evidence connected with the marital relation, or the presumptions of the common law arising therefrom.

These principles apply with equal force to the employment, by the wife, of servants for ordinary domestic service in and for the benefit of the husband's family, and dispose of this case. The plaintiff's case rested exclusively upon her own testimony. She testified, in substance, that the defendant engaged her as a seamstress to sew at her residence, where she lived with her husband and their children; that she went there in pursuance of such engagement, and sewed for twenty-four days upon clothing for the children; that she knew, at the time of the employment, that the defendant was a married woman, living with her husband and family; that the defendant agreed with her as to the amount of her wages, but did not mention

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her husband, or state who would pay her ; that while she was at work in the family, the defendant told her she had property of her own, and her husband had property, and that she was going to sell some land, and when she did, she would pay her ; and that two months after the completion of the service she paid her four dollars on account thereof.

It does not appear from the evidence that at the time of the employment any express agreement was made that the defendant should be responsible, as principal, for the wages, or that any thing occurred to take the case out of the ordinary presumption that the employment was in behalf of the husband ; nor does it appear that the husband disputes his liability on the contract. What was said with reference to the ownership of separate property by the defendant, and the payment of the plaintiff from the proceeds of the sale, after the contract of employment was made (which was for reasons already stated binding on the husband) and while it was being performed, was not, we think, sufficient to shift the obligation of payment from the husband to the defendant, or to render her liable. It is to be regarded, under the circumstances, as a mere voluntary promise. We also think it is to be assumed, *prima facie* at least, in the absence of any thing in the pleadings or proofs to the contrary, on grounds of common knowledge, that the service performed by the plaintiff was an ordinary domestic service, such as the wife might reasonably employ for the benefit of the family.

It follows from these views that the motion to dismiss, when the plaintiff rested, should have been granted, and it is therefore unnecessary to consider alleged errors in the instructions to the jury.

Judgment reversed, and new trial granted.

ALLISON V. ARMSTRONG.

(28 Minn. 276.)

Mortgage — mortgagor acquiring tax title.

A mortgage being conditioned for the payment of the taxes by the mortgagor, he cannot acquire a valid tax title to the premises as against the mortgagee, during the life of the mortgage, although the mortgagor has sold the premises and there is no personal covenant that he shall pay taxes.

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ACTION to foreclose a mortgage. The opinion states the case. The defendant had judgment below.

A. G. Wedge, for appellant.

C. K. Davis, for respondents.

MITCHELL, J. The facts of this case, so far as here material, are as follows: On the 30th of September, 1867, defendant Armstrong, being indebted to the plaintiff's testator in the sum of \$500, executed to him a mortgage, to secure payment thereof, upon the premises described in the complaint, conditioned "that if the said Thomas H. Armstrong, his heirs, executors or administrators, shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors or assigns, the sum of \$500, with interest * * * and also pay all taxes which may be hereafter assessed on said premises, then this deed to be void." But if default should be made in the payment of said sum of money, or the interest or the taxes, then the mortgagee was authorized to sell the mortgaged premises, etc. The mortgage contained no express personal covenants to pay the debt secured, or the taxes. On the 22d of January, 1870, defendant Armstrong executed a contract of sale of the mortgaged premises to defendant J. D. Farnham, under which the latter immediately went into possession and has ever since remained in possession, and by which he agreed to pay all taxes that might thereafter be assessed on the premises. On the 3d of December, 1873, in pursuance and performance of this contract, Armstrong conveyed the premises to defendant Philinda K. Farnham, wife of J. D. Farnham, the conveyance being made to her with the consent of her husband. In the conveyance Armstrong covenanted that said premises were clear, free, and unincumbered by any act of his except the mortgage above described, which he agreed to pay. Armstrong took back from Farnham and wife a mortgage on the premises for purchase-money, which is still unpaid and not discharged. All these conveyances were duly recorded. Farnham and wife failed to pay the taxes for the years 1873 and 1874, and tax judgments were rendered therefor against the premises, and the same were sold thereon at tax sales, in the years 1874 and 1875, respectively, at which sales and each of them, Armstrong bid in the premises, and obtained certificates of sale, under which

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(the land not having been redeemed) he obtained tax title. Armstrong subsequently conveyed to defendant Marston.

Armstrong having failed to pay the debt secured by the mortgage, plaintiff brings this action to foreclose the mortgage, making Marston a party, and praying that the tax titles obtained by Armstrong, under whom she claims, be adjudged in fraud of plaintiff's rights, and that the purchase of the premises at such tax sales be adjudged to operate merely as a payment of the taxes. Inasmuch as plaintiff's mortgage was of record, defendant Marston is chargeable with notice of it, and of all rights under it, and hence stands in no better position than her grantor, Armstrong, would have done; hence the question to be determined is whether under this state of facts Armstrong could acquire a tax title so as to defeat the lien of the mortgage which he had previously given to Van Buren, plaintiff's testator.

On behalf of defendant, it is insisted, that inasmuch as the mortgage contained no express personal covenants on the part of Armstrong to pay the taxes, and inasmuch as he was neither the owner nor in possession of the premises at the time these taxes were assessed, therefore he was under no obligation to pay them, and hence he was under no disability which prevented his acquiring a tax title, even as against his mortgagee. The text-books frequently lay down, without limitation or qualification, the general proposition that a mortgagor cannot acquire a tax title so as to defeat the title of the mortgagee. We are not prepared to say that so broad and unqualified a proposition is an accurate statement of the law; neither are we called on to decide it in this case. It is undoubtedly true that in most of the cases cited to sustain this proposition the turning point was the obligation of the party setting up the tax title to pay the taxes. The principle underlying all such cases is that a party cannot build up a tax title upon his own neglect of duty. A person will be precluded from making and relying upon a purchase of land for taxes whenever something exists in the facts of the case which imposes upon him the duty to pay the tax, or something which renders it inequitable, as between himself and the holder of the existing title, that he should make the purchase. *Blackwood v. Van Vleet*, 30 Mich. 118. From the principles established by the adjudicated cases, we think it follows that a mortgagor cannot, as against the mortgagee, build up a tax title upon a default in the conditions of the mortgage. A mortgage

has been defined as a conveyance of land as security for the payment of money or the performance of some other act, and to be void upon such payment or performance. 1 Hill. on Real Prop. 540. Nothing but performance of the condition or an express release will operate to discharge the lien of the mortgage. 1 Hill. on Real Prop. 611. Nothing but payment of the debt and taxes will discharge the mortgage. This position is grounded on the words of the condition of the mortgage itself, which are, if these be paid, the mortgage shall be void. The very terms of the contract itself are that it shall be void only on fulfillment of the condition. 1 Jones on Mortgages, § 69 ; 2 Hill. on Mortgages, 476-7 ; *Davis v. Maynard*, 9 Mass. 242.

In the case at bar the condition of the mortgage is that if the mortgagor shall pay the debt, "and also pay all taxes which may be hereafter assessed on said premises, then this deed to be void." It is immaterial that this latter part of the condition, in reference to the payment of taxes, is merely in aid of the principal debt secured by the mortgage. So long as that debt is unpaid, this latter part of the condition is as operative and vital a part of the terms of the contract as that making the conveyance conditional upon payment of the mortgage debt. 1 Jones on Mortgages, § 77. So long as the mortgage debt is unpaid, the mortgagor can no more acquire title, so as to defeat the mortgage lien founded upon his default in that part of the condition, than upon a default in any other part of it. Suppose that in the condition of this mortgage, in place of this proviso regarding the payment of taxes, there had been inserted the following : "And also pay a certain prior mortgage on said premises, executed by a former owner of the premises," — for the payment of which however defendant Armstrong was not personally liable to the holder thereof ; and suppose, default having been made in the payment of such prior mortgage, it should be foreclosed, and the premises sold, and at such sale defendant Armstrong had become the purchaser, — would he be permitted thus to acquire title so as to defeat the lien of his own mortgage ? We apprehend not. A court would hold that as against his mortgagee such purchase operated simply as a payment of the prior mortgage.

We think the case supposed analogous to the case under consideration. The condition in the former case, in reference to payment of the prior mortgage, like that in the latter regarding the payment of taxes, was merely in aid of the security for the debt secured by

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the mortgage. Both referred to paramount liens — one by virtue of its priority in time, the other by virtue of the paramount rights of the State. In neither case would the mortgagor be permitted to acquire title so as to defeat the lien of the mortgage, because to allow him to do so would be to allow him to build up title upon a default in the conditions of his own mortgage; or in other words, to allow him to discharge the lien of the mortgage without performance of its conditions. We think this cannot be done. We are therefore of opinion, that under the terms and conditions of this mortgage, Armstrong could not acquire a tax title to the mortgaged premises as against plaintiff's mortgage, and that his purchase of the premises at tax sale operated, as to plaintiff, merely as a payment of the taxes.

The judgment of the court below is reversed, and the cause remanded with instructions to enter judgment or decree in favor of plaintiff, in accordance with this opinion.

Judgment reversed.

AUERBACH V. LE SUEUR MILL COMPANY.

(28 Minn. 291.)

Corporation — negotiable paper irregularly issued.

A private corporation, authorized to issue negotiable paper, is bound by its note in the hands of an innocent holder for value, although in executing it the corporation exceeded the amount of indebtedness which it was authorized to incur.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Bangs & Emery and S. & O. Kipp, for appellant.

Warner & Severance, for respondents.

DICKINSON, S. This action was tried before the court, MACDONALD, J., without a jury, who filed his decision awarding judgment in favor of the plaintiff. The defendants moved for a new trial, and from the order refusing the same appealed to this court. Nu-

* See *Pratt v. Short* (79 N. Y. 437), 85 Am. Rep. 531.

merous exceptions were taken at the trial to the rulings of the court in respect to the evidence, but none of the questions thus raised are important in the determination of this case ; for whether such exceptions were well taken or not, the decision must be sustained upon facts found by the court below from evidence which was clearly not subject to objection, and the rulings of the court in respect to which exceptions are alleged here could not have affected the result.

These facts are as follows : The defendant is a private corporation, organized in 1874, pursuant to the provisions of Gen. Stats. 1866, chap. 34, title 2, for the purpose of building and operating a steam flouring-mill. One of the original articles of incorporation provided that " the highest amount of indebtedness or liability to which said corporation shall be subject shall not exceed \$5,000." In 1875, the corporation made to one Stewart its promissory note for \$9,000, and secured the payment of the same by a mortgage upon its mill property. On 11th day of May, 1877, the mortgage was foreclosed by a sale made on that day, and the mortgaged property was purchased on such foreclosure sale by the mortgagee, for the amount of the mortgage-debt, which then exceeded \$11,000. No redemption was made from this sale. On April 6, 1877, the defendant also executed to one M. Doran its promissory note for \$6,000, payable on demand, a considerable part of which remained unpaid on the 6th day of May, 1878. On the 6th day of May, 1878, the defendant made to M. Doran its promissory note, signed by its president and secretary, and with its corporate seal affixed, for the sum of \$3,694.60, payable to M. Doran & Co., or bearer, on demand, with interest. On this note this action was brought, the same having been, before maturity, transferred to the plaintiff for a valuable consideration and in good faith, as is found by the court below. Doran was a stockholder and director of the corporation during all of the period covered by these transactions. The ordinary financial business of the defendant in buying grain and selling foreign consignments of flour was largely done through M. Doran & Co., which was a banking co-partnership, and of which said Doran was a member. The consideration of the note upon which the action was brought was a balance in favor of M. Doran & Co., found due them upon settlement of a current account of such business.

Upon these facts arise the legal questions whether the instrument sued upon is a negotiable instrument ; and whether, if so, the plaint-

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iff, as a *bona-fide* holder before maturity, is entitled to recover upon it, notwithstanding the fact that the corporation, in incurring the debt evidenced by it, exceeded its authority as to the extent of the indebtedness it might contract. It has already been determined by this court, in *Sullivan v. Murphy*, 23 Minn. 6, that corporations organized under the general law above referred to, and under which this defendant was incorporated, are, by implication at least, authorized to incur debts in the ordinary transactions of their business, and that they may evidence such debts by their promissory notes. See also *Chaska Co. v. Board Supervisors of Carver Co.*, 6 Minn. 204; 1 Dan. Neg. Inst., §§ 381-382. In the case of this defendant the power to create debts is also plainly to be inferred from the express limitation upon that power contained in its articles. The conclusion is that this defendant had power to create debts, and to give its negotiable promissory notes therefor.

[Omitting a statutory matter.]

Where a private corporation has authority to issue negotiable securities, such instruments, when issued, possess the legal character ordinarily attaching to negotiable paper, and the holder in good faith, before maturity, and for value, may recover, even though in the particular case the power of the corporation was irregularly exercised or was exceeded; or to state the legal proposition in its application to this case, this defendant having power to incur debts to a limited extent and to issue its negotiable notes therefor, the plaintiff, as a *bona-fide* holder of the note in suit, may recover upon it, although in this particular case the indebtedness of the corporation at the time of giving this note already exceeded the limits prescribed by its articles of association. *Stoney v. American Life Ins. Co.*, 11 Paige, 635; *Mechanics Bank Association v. New York & Saugerties White Lead Co.*, 35 N. Y. 505; *McIntire v. Preston*, 10 Ill. 48; *Monument National Bank v. Globe Works*, 101 Mass. 57; *Bissell v. Mich. Southern & Northern Ind. R. Co.*, 22 N. Y. 258, 289; *City of Lexington v. Buller*, 14 Wall. 282; *Moran v. Miami County*, 2 Black, 722; Angell & Ames on Corp., § 268; Field on Corp. 303; Green's Brice's *Ultra Vires*, 273-4, 729. Although in such a case the corporation or its officers exceeded the corporate authority, and its contract would be, hence, in a sense, *ultra vires*, yet other legal principles, besides those merely relating to the powers of the corporation, come in to affect the result.

It is true, a corporation is a being created by the law, and has

properly no authority but such as is conferred upon it, expressly or by implication, by the law of its creation ; yet it may become legally bound to observe and perform contracts which it had not authority to enter into. The ends of justice may require, as in this case, that the corporation which has exceeded its powers should be estopped by its own acts from pleading, in defense of its assumed obligations, that they were *ultra vires*. To apply the principle of estoppel is not to enlarge the powers of the corporation ; nor does it give warrant to a corporation to disregard or violate the restrictions which have been expressly imposed upon it, or which exist in the absence of power conferred. It was said by the court in *Bradley v. Ballard*, 55 Ill. 413: "This doctrine (estoppel) is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished." In *Railway Co. v. McCarthy*, 96 U. S. 258, the court say : "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." Whether the plea of *ultra vires* should be allowed as a defense to assumed obligations should not be determined without regard to the character and objects of the incorporation, the nature of the powers conferred or withheld, the particular character of the obligations assumed or contract entered into, the relations of the contracting parties, and the *bona fides* of him against whom the doctrine of *ultra vires* is asserted.

In this case the defense sought to be made to the note is that in giving it the article of the defendant's incorporation, limiting the amount of its indebtedness, was violated. The debt was incurred in the ordinary prosecution of the business of the corporation. The defendant received and appropriated the money which was the consideration of the note, and having authority to issue negotiable paper, it put forth the note in question, negotiable, calculated to circulate as, and perform the office of, commercial paper, and expressing upon its face the obligation and promise of the maker to pay to the bearer, at all events, the sum named. It has come into the hands of a *bona fide* purchaser, and simple justice, as well as plain principles of law, forbid that courts should listen to the plea that in this particular case the corporation had not authority to issue its note. It ought to be and it is estopped. To so hold does not weaken the sanction of the law which restrains the exercise of

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corporate power within the limits prescribed by the creative act. To refuse to recognize and enforce, when necessary to the attainment of justice and prevention of wrong, such contracts, made in violation of the corporate charter, is not to afford a remedy for the wrongful acts of the corporation. When in a case like this, the unauthorized contract has been executed by the corporation, and it has reaped the benefits of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law. In such a case, the remedy for the violation by the corporation of its charter power lies elsewhere. We are here seeking to administer justice as between these contracting parties. If justice did not invoke the application of other principles of law, the defense of *ultra vires* might be sufficient; but the doctrine of estoppel, as a principle of law, is as positive and well-recognized as is the law that a corporation may not exceed its corporate powers, and although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to him who has been misled by its acts performed within the general scope of its powers.

What has been said should be regarded only as said with reference to this case, and should not be considered as stating a rule of law which should prevail generally in the case of contracts not negotiable. While the broader ground last referred to was considered by the court below, and discussed by counsel in this court, yet upon the facts found by the court such was not this case, and the question being an important one, we ought not to anticipate its presentation for adjudication by an opinion not called for by the facts in this case. Nor is it important, as this case stands before this court, that the contract of the corporation was with one of its own officers, for the court has found that the plaintiff purchased the note in good faith, and without notice of any defense thereto. The fact the note was payable to "M. Doran or bearer" did not necessarily notify the plaintiff that Doran was an officer of the corporation or connected with it.

The exceptions presented on the record, except such as have been already considered, relate to matters which could not affect the result, and we deem it unnecessary to pass upon them.

Order affirmed.

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CARLI V. STILLWATER STREET RAILWAY AND TRANSFER COMPANY.

(28 Minn. 372.)

Eminent domain — railway in street — riparian rights.

A horse railway may not be laid in a city street, solely as a freight transfer track between two steam railways, without compensation to the adjoining land owners;* and this is so, although the street is on land made by filling below low-water mark in a navigable river or lake.

ACTION to enjoin the operation of a railway on an alley. Plaintiff owns lots in Stillwater, abutting on Lake St. Croix, and fronting on Main street. The lots are bisected by an alley thirty feet wide, parallel to the lake, and the land between the alley and the shore is used in connection with navigation, and is valuable therefor, and the access to it on the land side is the alley. The defendant, under an ordinance of Stillwater, constructed a railroad through the alley, without compensation to the plaintiff. The plaintiff had judgment below.

McCluer & Marsh, for appellant.

J. N. & I. W. Castle, for respondent.

CLARK, J. 1. It is the law of this State that the construction and maintenance of an ordinary railroad by legislative authority upon a public street is the imposition of an additional servitude upon the soil, so as to entitle the owner of the servient estate to compensation. *Schurmeier v. St. Paul & Pacific R. Co.*, 10 Minn. 82; *Winona & St. Peter R. Co. v. Denman*, id. 267; *Gray v. First Division St. Paul & Pacific R. Co.*, 13 id. 315; *Harrington v. St. Paul & Sioux City R. Co.*, 17 id. 215; *Adams v. Hastings & Dakota R. Co.*, 18 id. 260; *Kaiser v. St. Paul, Stillwater & Taylor's Falls R. Co.*, 22 id. 149; *Brisbine v. St. Paul & Sioux City R. Co.*, 23 id. 114.

In order to determine whether the case in judgment comes within the authority of these cases, it is requisite to inquire, to some ex-

*See *Hess v. Balt. & H. Pass. Ry. Co.* (53 Md. 242), 36 Am. Rep. 371; *Stanley v. City of Davenport* (54 Iowa, 453), 37 Am. Rep. 216.

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tent, into the grounds upon which they must rest. And in the first place, it is obvious that inasmuch as the public, under the laws of this State, has only an easement in the land dedicated or taken for a public street, the uses to which it may be put by public authority must depend upon the character of that easement. The public use cannot lawfully go beyond, but must be confined within, the purposes for which the easement was granted by or acquired from the original owner of the soil. When a man dedicates to the public land for a highway, street, or alley, he must be supposed to have in view the benefits which will result to his remaining lands from the particular use to which he dedicates it. And when land is taken for a street, the compensation therefor is adjusted with reference to the benefits and injuries which the proprietor of the remaining land will receive and sustain by reason of the opening of the street. And these benefits and injuries will be estimated with reference to the identical use to which the property taken is appropriated.

Bouvier defines a highway as "a passage, road, or street which every citizen has a right to use;" a street as "a public thoroughfare or highway in a city or village." The following definitions by the courts may also be adverted to: By the dedication "the public acquire nothing beyond the mere right of passing and repassing upon the highway, and in all other respects the rights of the original owner remain unimpaired." *Williams v. Central R. Co.*, 16 N. Y. 97. The easement of a highway "embraces all public travel, not prohibited by law, on foot, in carriages, omnibuses, stages, sleighs, or other vehicles, as the wants and habits of the public demand." *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579. "The right of the public in a highway consists in the privilege of passage, and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and lay gas and water pipes." *State v. Laverack*, 34 N. J. 201.

It can hardly be questioned that the primary and fundamental purpose of a public highway, street, or alley is to accommodate the public travel; to afford citizens and strangers an opportunity to pass and repass, on foot or in vehicles, with such movable property as they may have occasion to transport; and every man has the right to use upon the road a conveyance of his own at will, subject to such proper regulations as may be prescribed by authority. In cities custom has sanctioned the use of the streets for sewers, and

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for water and gas pipes; and it is probable that at no distant day pipes for the transmission of steam for heating and mechanical purposes will be added. It is to be observed that sewers and pipes are laid beneath the surface of the street, so as to be no impediment, after they are laid, to the public travel, and no detriment to the abutting owner. The latter has a peculiar interest in the street somewhat different from that of the general public. He may maintain an action to suppress a nuisance in the street, on the ground of a special injury to himself. It is his right to have free access from his abutting property to the street, and to have the street kept in a condition for its primary and principal use, so as to enable the public readily to gain access to his residence or business; and the value of his property depends largely upon the preservation of this right. The right is however subordinate to the public convenience, of which the public authorities having control of the streets are the judge. He cannot therefore recover consequential damages occasioned by a change of grade made by the proper authority, unless enabled so to do by statute.

We do not think this easement for public travel is to be limited to the particular modes of travel in use at the time the easement was acquired, but that it extends to and includes all such new and improved methods of travel, the utility and general convenience of which may be afterward discovered or developed, as are in aid of the identical use for which the street was acquired. The regulation and control of highways, streets and alleys, and of the use thereof, for the purposes for which they were created, is in the legislature, and it is well settled that this power of control may be delegated to and reposed in the municipal corporations within which the streets are situated; but it follows, from what has been said, that the legislature has no power, directly or indirectly, to impose a new servitude upon the soil, or to subject it to a new burden injurious to the owner of the servient soil, without making him the just compensation required for the taking of private property for public use.

The construction and operation of an ordinary railroad in a public street having been decided to be a new use of the street, and therefore an additional burden upon the soil, with a view to ascertain whether the defendant's railroad comes within the reasons of these adjudications, it is next necessary to consider the character of the use to which the defendant has, by the authority of the city

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council, so far as it had any power in the matter, put the alley in question.

By reference to the findings of the court, it appears that the principal, if not the only purpose of the track now constructed and proposed to be maintained and operated, is for a transfer track between two lines of railroad running into the city of Stillwater. It connects these lines, which terminate in different parts of the city. It is built partly upon the alley, and partly upon property acquired for the purpose from private owners by condemnation and purchase. It has never been used, and it is not proposed to use it, to carry passengers. Its only use, so far as appears, is to transfer freight cars, of the kind ordinarily used on railroads, from the terminus of one railroad to that of another railroad. It is not proposed, as the reason and object of its existence, to receive freight at any point on the street or alley, or to deliver freight at any point thereon.

It is evident from all the facts that this road is not located on the street because its business is to be derived from the street, and that its purposes would certainly be equally well fulfilled if it was on property of which the defendant should have the exclusive use. On the other hand, the public travel on the alley derives no aid or advantage from its location there, but is and must be more or less impeded thereby. The public would be in every respect as well served if the road were on private property remote from the street its whole distance. In a word, the road is not on the alley, instead of other lands, because it is of any advantage either to the defendant or to the public that it should be there, except for economical reasons to the defendant. The construction of the track on the street cannot therefore be said to be in aid of the public travel for which streets are created, any more than it would be if it was part of a continuous line of railroad running through the city of Stillwater. If the use would be a new one in the latter instance, it is a new one for the same reasons in the present case, and the abutting owner is entitled to compensation upon the same principles. The fact that the cars are moved by animal power instead of steam is not a controlling consideration, and the control reserved by the city council over the manner of construction and mode of operation of the railroad is no different from that ordinarily exercised by municipal corporations, or which they have the power to exercise by legislative authority over ordinary railroads

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constructed through or into cities, and across or upon the public streets thereof.

We have been referred to several cases decided by courts of high authority, in which it was held that the authorization of street railways, such as are ordinarily used in cities, is not the imposition of an additional burden upon the street, for which the owners of the servient estate are entitled to compensation ; and the weight of authority is to this effect. But it is obvious that the purpose and use of an ordinary street railway are very different from those of the railroad under consideration. Street railways derive their business from the street ; are intended for the convenience of the travel thereon ; and may, with much force of reason, be said to be in aid of the identical use for which the street was created, and not a new and independent use. It is to be observed that it is becoming common for transfers of cars in cities, from one line of railroad to another, to be made by an independent transfer company, owning its own tracks ; and there is no sufficient basis of reason or utility for a discrimination which would deny compensation to the abutting owner for the use of his servient estate for railroad purposes by a transfer company, and uphold his right to compensation for a substantially similar and no more detrimental use by railroad companies, operating lines into or through the same cities. We are of opinion therefore that the use to which the defendant has put the alley is within the adjudications of this State, the imposition of a new and additional servitude upon it.

2. It appears that block 2S in the city of Stillwater, as originally platted, extends to the waters of Lake St. Croix, through which flows the St. Croix river, a navigable stream. The lots in this block front on Main street on the west, and run back east to the lake ; and there was laid down on the plat, across the lots, an alley 30 feet wide, called Stimpson's alley, running north and south through the block, upon which defendant's railroad is constructed. The plaintiff is the owner of certain of these lots. It further appears from the verdict of the jury upon certain questions submitted, that the alley and all that portion of the lots lying east of it was below low-water mark at the time the plat was made, though the lots as platted are entirely within the meander line of the government survey.

This last fact is however not material, as it is well settled that in such cases the stream and not the meander line is the boundary. That portion of the lots intended, as appears from the plat, to be

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subjected to the easement of a public alley, and all lying east of the alley, is "made land," having been reclaimed from the waters by filling out into the lake. When or by whom this filling was done does not distinctly appear ; but inasmuch as it is found "that Stimpson's alley is a public street in the city of Stillwater, duly laid out and established, and has been in use as such for more than fifteen years, and is under the care, custody, and control of the city council," it follows that a portion, at least, of the filling was done at least fifteen years ago ; and as it is not claimed on the part of the defendant that the State ever undertook to assert any dominion over this made land, except as to the easement of the alley, through the power delegated by the city charter, I think it must be assumed that such filling was done by the owners of the lots for their own use. It is not found whether the filling was done in shallow or deep water ; but inasmuch as it is found "that the portion of said lot east of said alley claimed by the plaintiff fronts upon Lake St. Croix, * * * and is of value as a landing for boats and business purposes," it is to be assumed that the filling out into the lake was for the purpose of reaching navigable water, so as to make the shore available for the uses connected with the navigation of the river.

It is claimed that the plaintiff's title did not extend to lands covered by the waters of the lake, but stopped at the line of low water ; and such is the law. But it is well settled that the owner of land bounded by a navigable stream has certain riparian rights which spring from the ownership of the bank, and are not dependent upon a strict legal title in him to the soil covered by the water. These rights were clearly defined by Mr. Justice Cornell in *Brisbane v. St. Paul & Sioux City R. Co.*, 23 Minn. 114, as follow : "The right to enjoy free communication between his abutting premises and the navigable channel of the river ; to build and maintain, for his own and the public use, suitable landing-places, wharves and piers on and in front of his land and to extend the same therefrom into the river to the point of navigability, even though beyond low-water mark ; and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority." In addition to the authority cited in the opinion in this case, the doctrine has the authority of a recent English case in the House of Lords, and we are satisfied that it rests upon solid grounds of justice

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and utility. *Lyon v. Fishmongers' Company*, L. R., 1 App. Cas. 662. It does not appear that the use made of the shore in this case has caused the least impediment to the free and unobstructed navigation of the river, or has been prejudicial in any way to the public interests. These riparian rights are property, and cannot lawfully be taken for public use without compensation. *Brisbine v. St. P. & S. C. R. Co.*, *supra*; *Fates v. Milwaukee*, 10 Wall. 497. We think the acts done by the defendant are an invasion of the riparian rights of the plaintiff.

The decision of the court below having been in accordance with the conclusions reached by us, it follows that the judgment appealed from must be affirmed.

Judgment affirmed.

STATE V. GREAR.

(38 Minn. 493.)

Criminal evidence — confession under intoxication.

A confession made by one intoxicated at the time is not incompetent for that reason.

CONVICTION of assault. The opinion states the case.

A. N. Merrick, for appellant.

William J. Hahn, attorney-general, for the State.

DICKINSON, J. The defendant was indicted for an assault, being armed with a dangerous weapon, with intent to do great bodily harm. Upon trial he was convicted of this offense. Upon bill of exceptions, motion was made for a new trial, and from an order overruling the same this appeal was taken.

Upon the trial, the State called a witness by whose testimony it was proposed to prove statements of the defendant in the nature of a confession. Objection was made to this, upon the ground, that as was claimed, the defendant was so intoxicated at the time of the alleged confession that he did not know what he was saying, and defendant's counsel claimed the right to examine the witness upon

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this point before his evidence of the confession should be received, and offered also to call other witnesses to the same fact at the same stage of the trial. This was refused by the court, and exception was taken. The court was right. Intoxication of the accused at the time when he may have made a confession would have affected the weight of the confession as evidence against himself, but would not go to exclude the confession from being put in evidence. *Com. v. Howe*, 9 Gray, 110; Whart. Cr. Ev. 675-6. That degree of intoxication which leaves one capable of making a narration of past events, or stating his own participation in a crime, is not sufficient to exclude the inculpatory statement from the consideration of the jury.

[But on another point]

Order reversed, and a new trial ordered.

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CASES
IN THE
SUPREME COURT
OF
MISSOURI.

DOWLING V. ALLEN.

(74 Mo. 13.)

Master and servant — dangerous machinery — fellow-servant.

An inexperienced boy of seventeen, employed to work on visibly dangerous machinery, is entitled to warning of the danger from his employer.

The foreman and general superintendent of a machine shop hired a boy and told him to do whatever K., another employee, directed him. K. being in charge of dangerous machinery, told the boy to do a certain act in regard to it whereby he was injured. Held, that K. and the boy were not fellow-servants as to that act, and the boy could recover against the principal.*

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

Martin & Lackland, for appellant.

Fisher & Rowell, for respondent.

HENRY, J. We have adopted the statement of this case made

* See *Corcoran v. Holbrook* (59 N. Y. 317), 17 Am. Rep. 300.

by the Court of Appeals, having from an examination of the record, found it substantially correct.

This is an action for damages for injuries done to plaintiff whilst in the employ of defendants, a corporation carrying on a foundry in St. Louis. At the close of plaintiff's case, defendants offered an instruction in the nature of a demurrer to the evidence, which was granted. Plaintiff then took a nonsuit, and the court having overruled a motion to set it aside, plaintiff appeals. There was evidence tending to show the following facts : Plaintiff, a boy seventeen years of age, at the request of his father, was hired by the defendant. At the time he was thus hired, he had no experience in foundry business, or with machinery, and of this fact, Fisher, the foreman and general superintendent of defendant's foundry, who hired him, was informed at the time. During the first two months of his service with defendant, plaintiff was employed in running errands and in sweeping out. During the last month he was employed in the machine-shop and in the yard, where a turntable was being constructed, under the charge of one King, a fellow-servant of the plaintiff. The foreman of the defendant, who had hired plaintiff, told him to go with King and do whatever he told him, and plaintiff did so. Plaintiff's father, who was also employed in the foundry, remarked the boy one day working under King's directions at a lathe, and told King that that was dangerous work for the boy, as he was "green." To this King replied, that the boy was better and sharper than some of the men ; and no more was said at the time. The boy himself told King that he did not like being employed to help him, and that King had better get some one to take his place ; but King persuaded him to remain at the turntable. The turntable was inside of the foundry. It was over thirty feet in diameter. Running east from this table, a little south from the center of it, was a shaft about twelve feet long and six inches in diameter. This shaft was covered, except for the space of three or three and a half feet nearest the turntable. The lower part of the shaft was about ten inches above the floor, and could be stepped over, at the place where it was not protected, and the men employed in the foundry were in the habit of stepping over it when going to and fro. At the end nearest the turntable, the shaft had a collar about an inch and a half thick, and from this collar projected a set-screw about two inches high. The plaintiff said in his direct examination : "The collar was a close fit. I don't exactly

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know how large the set-screw was. The shaft was between eight and ten inches high. I could step over it easily enough. The shaft revolved rapidly. The set-screw could not be seen when the shaft was revolving. I did not see the set-screw before I was injured," and further on he said: "I had never taken particular notice of that set-screw before I was injured." At the date of the accident, plaintiff had been working about three weeks at the turntable, with King. King directed him to stop the engine. This was done by pulling a string, to shut off the steam. The engine was at the other side of the turntable. It could be reached in two ways. The shorter way was to cross the revolving shaft. King told the boy to hurry, and he took the shorter way. In stepping over the shaft the leg of his trousers was caught by the set-screw. His leg was drawn under the shaft, and so badly broken as to render immediate amputation necessary to save his life.

The question presented for determination is not free from difficulty. The principles of law on the subject of the liability of the master to the servant for injuries received by the latter in the service of the former, are reasonably well settled, and the only difficulty lies in their application to the facts of a given case. One who enters the service of another takes upon himself the ordinary risks of the employment. *Smith v. St. Louis, Kansas City & Northern R'y Co.*, 69 Mo. 39 ; s. c., 33 Am. Rep. 484 ; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66 ; s. c., 36 Am. Rep. 454 ; *Coombs v. New Bedford C. Co.*, 102 Mass. 572 ; s. c., 3 Am. Rep. 506. On the other hand, if there are concealed dangers known to the employer, and unknown to the employee, it is the duty of the employer to notify the servant of their existence. *Id.* We think the doctrine equally well settled by the authorities, that although the machinery, or that part of it complained of as especially dangerous, is visible, yet if by reason of the youth and inexperience of the servant he is not aware of the danger to which he is exposed in operating it, or approaching near to it, it is the duty of the master to apprise him of the danger, if known to him. See cases above cited, and also *Grizzle v. Frost*, 3 Fost. & Finl. 622 ; *Clarke v. Holmes*, 7 H. & N. 937. It is not a conclusion of law from the fact that plaintiff was aware of the existence of the set-screw, and was seventeen years old, and sprightly for one of his years, that he was aware of the risk and danger of passing over the shaft while it was in motion.

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In *Grizzle v. Frost, supra*, a girl sixteen years of age was employed in a dangerous service, and was injured by having her hand caught between two revolving rollers of the machinery. COCKBURN, C. J., observed that : “ If the owners of dangerous machinery, by their foreman, employ a young person about it, quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper, and which are likely to lead to danger, of which the young person is not aware, as it is their duty to take unusual care to avert such danger, they are responsible for any injuries which may ensue from the use of such machinery.” In that case the revolving rollers, and the manner in which they worked, were visible. The plaintiff was sixteen years of age, but it was not inferred as a matter of law, because she was of that age and knew of the existence of the revolving rollers, that she was also aware of the risk and danger to which they exposed her. As was observed by the same learned chief justice in *Clarke v. Holmes, supra* : “ A servant knowing the fact may be utterly ignorant of the risks.” The case of *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 558, cited by respondent, is not in conflict with but sustains these views.

Coombs v. New Bedford Cordage Co., supra, is directly in point. It was there held that the defendant had the legal right to run its machinery without fencing or boxing, unless by so doing it exposed persons in its employment, or others who came upon its premises by procurement or invitation, to danger of which it gave no notice ; but if the danger was apparent, and the plaintiff had reasonable notice of the peril to which he was exposed, and understanding it, chose to undertake the employment which exposed him, he could not recover. On the other hand, if defendant knew, or had reason to know, the peril to which he would be exposed, and did not give him any sufficient or reasonable notice of it, and if he, without any negligence on his part from inexperience, or reliance upon the directions given him, failed to perceive or appreciate the risk, and was injured in consequence, the defendant would be responsible. In that case, a boy fourteen years of age, in the employment of the defendant had his hand caught in the gearing of a machine, and injured. The gearing was unguarded, but was in plain view. The case was retried and again came before the Supreme Court of Massachusetts, and the doctrine announced by the court on the former occasion was reaffirmed in an able opinion delivered by GRAY, J., 102 Mass. 595. We think that the true rule in cases

like this, was there announced, and that it is not an inference of law because plaintiff was seventeen years of age and sprightly, and the set-screw was in plain view and had been seen by him, that he was aware of the danger to which he was exposed in stepping over the shaft while it was in motion ; but that these questions, under proper instructions, should have been submitted to the jury.

Nor do we think that in this instance King, who gave the plaintiff the order to stop the engine, was plaintiff's fellow-servant. While it appears that Fisher was foreman of the establishment, King had charge of the construction of the turntable, and Fisher directed plaintiff to go with King and do whatever he directed. In *McGowan v. R. R. Co.*, 61 Mo. 528 : " There was no proof that the conductor had the superintendence or control over the men, or the work, or power to provide or replace machinery." Here King was foreman of the hands constructing the turntable. They were under him, and the plaintiff was expressly ordered by Fisher to do whatever King told him. A foreman of an entire establishment as extensive as defendant's cannot be everywhere present to direct the employees in their work, but must of necessity give orders through others, as in this instance. In *Marshall v. Schrick*, 63 Mo. 309, relied upon by appellant, it was held that : " The employer cannot be charged with negligence of one who was merely a foreman over the plaintiff, not engaged in a distinct department of the general service but in the same work with plaintiff, and not charged with any executive duties or control over plaintiff, which would constitute him the agent of the employer." Aside from the fact that King was foreman, here is the additional fact that Fisher directed plaintiff to do whatever King might order him to do, and he was in fact obeying Fisher in executing King's order. If it was negligence or recklessness to direct plaintiff to perform the work in the prosecution of which he received the injury, it was a direct consequence of an order given by Fisher, who was defendant's " alter ego."

[Omitting a question of pleading.]

Judgment affirmed.

Rothschild v. American Central Insurance Company.

ROTHSCHILD V. AMERICAN CENTRAL INSURANCE COMPANY.

(74 Mo. 41.)

Insurance — cancellation — agency.

A policy of insurance may not be cancelled except by stipulation in the policy or extraneous agreement, and an agent to procure insurance has no implied power to make such agreement.

ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

James O. Broadhead, for plaintiff in error.

Madill & Ralston, for defendant in error.

NORTON, J. Plaintiff instituted this suit in the Circuit Court of St. Louis county to recover \$2,500 on a policy of insurance issued by defendant insuring his stock of goods for that amount. On a trial of the cause, it was submitted to the court, and after hearing the evidence, the court sustained a demurrer to it and rendered judgment for defendant, from which plaintiff appealed to the St. Louis Court of Appeals, which affirmed the judgment, and the case is before us on writ of error. The opinion of the Court of Appeals delivered by LEWIS, P. J., contains an accurate statement of the evidence as well as of the law applicable to the facts, and after full consideration of the record we affirm the judgment on the ground therein stated, making no addition thereto except to cite in support of it the following authorities: *Hathorn v. Germania Ins. Co.*, 55 Barb. 28; *White v. Madison*, 26 N. Y. 117; *Alliance Ins. Co. v. Swift*, 10 Cush. 433; *Fabyan v. Union M. F. Ins. Co.*, 33 N. H. 203; Story's Agency, § 246.

The opinion is as follows: "The answer set up several defenses, of which only one need be here considered. The policy contained the following condition, viz.: 'If the assured shall have or hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of this company written hereon, this policy shall be void.' It appeared from the testimony that H. M. Blossom, an insurance broker in St. Louis, undertook for the plaintiff insurance in various companies, to the aggregate amount of \$15,000. He prepared an application containing a

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diagram of the plaintiff's premises, on which he wrote the name of each company, as its consent was obtained, with the sum for which it was to insure. The list when completed, stood thus : Citizens, \$2,500 ; American Central, \$2,500 ; The Boatman's, \$2,500 ; The Commercial, \$2,500 ; The Amazon (a Cincinnati company), \$3,000 ; The St. Louis, \$2,000. Blossom then obtained all these policies accordingly, and delivered them to the plaintiff. On the application, and on the policy issued by the defendant, there were memoranda showing that the total of insurance was to be \$15,000. Sometime afterward, while the plaintiff was in Louisiana, the agent of the Amazon company gave to Blossom a written notice that its policy was cancelled, and requested the return thereof. Blossom thereupon proceeded to get other insurance, and had obtained a policy of \$1,500 in the Pennsylvania Insurance Company, when the insured property was destroyed by fire.

Upon this state of facts, the plaintiff insists that there was no violation of the condition in the policy. He holds that nothing more was required than that the total insurance should never exceed \$15,000, and that by the substitution of the Pennsylvania policy for that of the Amazon, the amount was in fact reduced to \$13,500, at the time of the loss. To this the defendant makes two answers: First, that by a true interpretation of the condition above quoted the plaintiff was limited, not merely to the total of insurance mentioned, but also to the particular companies set down in Blossom's list on the application, which was made part of the policy. The Pennsylvania policy was therefore "other insurance," within the meaning of the condition ; and defendant's consent thereto not having been written on its policy, the same was made void. Second, that at the time of the loss the total of insurance was \$16,500, and this fact avoided the policy.

Upon the first of these two propositions, we are favored with a very able argument on either side. We do not propose however to announce any conclusion of our own upon it, since the second contains a simpler solution of the whole controversy. A policy is a contract between the insurer and the insured. Nothing in its nature implies that one party may at any time declare it ended. If by express stipulation the insurer may cancel it at pleasure, that fact must be distinctly shown ; it can never be presumed. Unless, in the present case, it satisfactorily appeared that the Amazon policy, by virtue of a power reserved to the company, or

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by agreement of the parties, was duly cancelled before the happening of the loss, it cannot be questioned that the plaintiff failed to make out a case, and that the demurrer to the evidence was properly sustained. That the policy-holder could not recover, if the total of his insurance exceeded the stipulated limit, is too well settled to admit of discussion. The Amazon policy was not offered in evidence, and nothing in the record intimates that a power of cancellation was reserved therein.

Was it cancelled by consent of the parties? The pleadings show that the plaintiff himself never consented; for he knew nothing about the alleged cancellation until after the loss.

The only claim of consent on his part, in any shape, must be through the action of Blossom, as his supposed agent. But no authority is shown in Blossom to give any such consent for the plaintiff. His agency to procure the insurance implied no authority to destroy it when procured, and vested in his principal. When he delivered the policies to the plaintiff, there was an end of his agency. There was therefore a total failure of proof that the Amazon policy was not a valid and subsisting contract of insurance, when the additional Pennsylvania policy of \$1,500 was obtained, and when the insured property was destroyed. No question can be raised about the plaintiff's responsibility for the act of Blossom in procuring the additional policy, since the pleadings show that he ratified the act and accepted the policy."

Judgment affirmed.

All concur in the affirmance of the judgment.

TRIGG V. ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY.

(74 Mo. 147.)

Damages — measure — mental suffering — remoteness.

A passenger on a railway, negligently carried beyond her destination, but receiving no personal injury or insult, may not recover for anxiety, effects on her health, nor danger in consequence of the train stopping an insufficient time to enable her to get off.*

*See *Brown v. Chicago etc., Ry. Co.*, ante, 41.

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ACTION of damages for negligently carrying plaintiff beyond her destination. The opinion states the facts. The plaintiff had judgment below.

Wells H. Blodgett, for appellant.

James M. Black, Joseph E. Black, and James L. Farris, for respondent.

HOUGH, J. In August, 1876, the plaintiff was at Norborne, in Carroll county, with her two children, one being four and the other between one and two years of age; and desiring to go to Hardin, in Ray county, she purchased a ticket entitling her to be carried from Norborne to Hardin on one of defendant's passenger trains. The train she took was the defendant's west-bound day train between St. Louis and Kansas City, which usually arrived at Hardin in the evening, between sundown and dark.

The material allegations of the petition are substantially as follows: "That she delivered her ticket to the conductor of the train, who was the agent of, and in the employ of defendant; that said conductor had full knowledge that she was to get off at Hardin; that it was the duty of said conductor to stop said train at Hardin a sufficient length of time to permit the plaintiff to get off at said station, but that instead of stopping said train a reasonable length of time for plaintiff to get off at said station, he carelessly and negligently started almost instantly upon stopping, and gave no assistance to plaintiff to get off; that she was not able to get off, and was exposed to great danger by the starting of the train, incumbered as she was with her children and baggage, and that in consequence thereof, she was carried to Richmond and Lexington Junction, in the county of Ray, about six miles from said station of Hardin."

The defendant's answer denied all negligence on its part, and averred that it was in consequence of plaintiff's own negligence that she failed to get off said train at Hardin station.

The facts developed at the trial were as follows: When the train arrived at Hardin, the plaintiff, being incumbered with considerable baggage and two small children, got to the platform of the car and handed out her baggage, but before she could hand one of her children to the person who was there to help her off, the train started. The brakeman, seeing her situation, and thinking she was

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about to step off while the train was in motion, stepped in front of her and prevented her from doing so. This, he says, he did, because he thought she would fall under the train with her children. The brakeman then pulled the bell-cord to give the engineer a signal to stop, but the bell-cord was caught, so that the engineer did not get the signal. By that time the conductor had arrived, and finding out the trouble, he sent the brakeman through the train to tell the engineer to stop ; but by the time the brakeman got to the engineer, and the engineer had stopped the train, it was some distance from the depot. The conductor then asked plaintiff if she would get off there, and she said she would not, and demanded that he should take her back to the depot at Hardin ; the conductor testified that he told her that after passing over the road, he had no right to go back, and that he was afraid to do so, for fear of running into something.

The testimony of the plaintiff, on this point, was as follows : " After a few moments the conductor came back to me and said : ' We have carried you past your station — what will you do about it ? ' I said : ' You will have to carry me back. ' He said : ' He could not do it, ' and turned off. I thought he spoke very sharp. After we had gone to the trestle-work below the town, the train stopped and the conductor said : ' We will put you off here. ' I said : ' No ; if you had stopped within a reasonable distance, I would have got off. ' It was then night. He then said : ' I cannot do any better than to carry you on to the Junction. ' I said : If that is the best you can do, you will have to carry me there. ' " The conductor then told her that they would soon be at the Junction, and that when they got there, he would have the porter come and carry her child to the waiting-room, and that he would meet her there. The conductor went to the waiting-room and asked her what was to be done ; and she said he would have to get a conveyance to take her back to Hardin, and thereupon the conductor went and got a light spring wagon in which to carry her back, but she refused to go in it, saying she wanted a " hack. " The conductor told her he could get nothing better than a spring wagon. Mr. Hughes, a bystander, then advised her to go back on the freight train, but the conductor told her the freight train was behind time, and advised her to go back in the morning on the passenger train. The conductor then took her and her children to the dining-room, and gave them, as she says, a good supper, for which he paid. He then told the

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landlady to give them a good room, and she gave them the best in the house, for which he also paid. He then gave the plaintiff fifty cents with which to pay her fare back to Hardin, which was only six miles from Junction, and went on with his train. It afterward appears that at the request of plaintiff's father the defendant's section boss at Hardin got out his hand-car and went to the Junction, and that plaintiff got up and returned with them of her own accord, and without any expense to Hardin on the same night.

As to the measure of damages, the court instructed the jury, at the request of the plaintiff, as follows: If the jury find for the plaintiff, in assessing the damages, they will take into consideration the delay to which plaintiff was subjected, the anxiety and suspense of mind suffered by her in consequence thereof, the physical hardship to which it subjected her, and the effect upon her health in consequence thereof, and the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, and will find such sum and amount as the jury may believe the plaintiff is justly entitled to from the evidence, not to exceed the sum claimed in the petition.

The jury found a verdict for plaintiff, and assessed her damages at \$1,000; and judgment was rendered accordingly.

[Omitting question of amount of damages.]

The instruction as to the measure of damages was erroneous. Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, was a proper element of damage in this case, as no personal injury was received by the plaintiff and no circumstances of aggravation attended the wrongful act complained of. If the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay in this case is a ground of recovery, similar suspense and anxiety of mind would be an equally good ground of recovery in a case where a railroad train should wrongfully stop to take on a passenger. The general rule is that "pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult or inhumanity." *Pierce on Railroads* (ed. 1881), 302; *Indianapolis, etc., Railway Co. v. Birney*, 71 Ill. 391. *Vide*, also, *Hobbs v. L. & S. Railway Co.*, L. R., 10 Q. B. 111; *P. P. Car*

Halliday v. St. Louis, Kansas City and Northern Railway Company.

Co. v. Barker, 4 Col. 344 ; s. c., 34 Am. Rep. 89 ; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7. If anxiety and suspense of mind are not a ground of recovery here, of course the effects are not. There is no evidence, that as a consequence of the defendant's negligence, the plaintiff was subjected to any physical hardship. The only exposure suffered by her was in returning on a hand-car at night in the month of August, to Hardin, and that was voluntarily encountered by her. *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7. We have not been referred to any case in which a simple exposure to averted danger has been held to be a ground of recovery, and we do not think it should be, unless the exposure were wanton and produced injury. The measure of damages in a case like the present should be limited to compensation for the inconvenience, loss of time, labor and expense of travelling back. *Nelson v. A. & P. R. R. Co.*, 68 Mo. 593 ; 2 Redf. on Railways (5th ed.), 262. The judgment will be reversed and the cause remanded.

Judgment reversed.

The other judges concur.

HALLIDAY V. ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY.

(74 Mo. 159.)

Carrier — connecting — limitations.

A connecting carrier, receiving property for transportation from the first carrier, the original contract contemplating such employment, is liable directly to the shipper for his negligence, and is entitled to all limitations in the original contract.*

ACTION against a common carrier for negligence in carriage of goods. The opinion states the case. The defendant had judgment below.

W. T. McCanne, for appellants.

Wells H. Blodgett and *Geo. S. Grover*, for respondent.

* See *Bancroft v. Merch. Desp. Trans. Co.* (47 Iowa, 202), 29 Am. Rep. 422.

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HOUGH, J. It is alleged in substance in the petition in this case, that on the 30th day of December, 1875, the plaintiffs delivered to Wm. Bond, receiver of the Missouri, Kansas & Texas Railway Company, at Madison station, in the county of Monroe, eighteen horses and mules, loaded in a freight car belonging to the defendant, which said receiver, for a certain sum paid to him by plaintiffs, contracted in writing to transport to the city of St. Louis; that by the terms of said agreement, said receiver had the right to transport said car of horses and mules over any other connecting railroad to the city of St. Louis, and that by the terms of said agreement said receiver was to be released from all liability for said stock after its delivery to such connecting line; that said car of stock was transported by said receiver over the Missouri, Kansas & Texas Railway to Moberly, and there delivered to the defendant to be by it transported to the city of St. Louis; that when said car was so delivered to the defendant the stock therein were in good condition and uninjured; that the slats on the side of the car of defendant in which said stock was loaded were negligently placed thereon so far apart that a bay mare which was in said car got her hind foot fastened between the same while on defendant's road between Moberly and St. Louis, and was thereby permanently injured, to plaintiffs' damage in the sum of \$75. The petition then proceeds to charge the defendant, as a common carrier, with a breach of duty in failing to provide a good and sufficient car for the transportation of said stock. The answer of defendant was a general denial only.

At the trial the contract between the plaintiffs and Bond, the receiver, was introduced in evidence by the plaintiffs. This contract bound the receiver to transport the stock to the city of St. Louis, and contained the following stipulations: "And said party of the second part (the plaintiffs) hereby accept for such transportation the cars provided by said receiver and used for the shipment of said stock, and hereby assumes all risk of injury which the animals, or either of them, may receive in consequence of any of them being wild, unruly or weak, or maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the cars, * * * or of loss or damage from any other cause or thing not resulting from the willful negligence of the agent of the party of the first part. * * * Said party of the second part further agrees that as a condition precedent to his

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right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock." It appeared from the testimony that the live stock in question arrived in Moberly, Missouri, on the 30th day of December, 1875, in good condition, and was there transferred by William Bond, as receiver, to the defendant, who transported it to St. Louis for him, in pursuance of his contract with the plaintiffs. No contract was entered into between the plaintiffs and the defendant. The stock arrived in St. Louis on the morning of the next day, and was all in good condition, except the mare mentioned in the petition. She was found with one of her hind feet fastened between the slats of that car, and the slats had to be cut out in order to set her free. This injury loosened her hoof and rendered her lame, and injured her in value to the amount of \$75. No notice of this injury was given by the plaintiffs, as provided in the contract, to the officers or agents of William Bond, the receiver, or to the defendant. At the close of the plaintiffs' case, the defendant demurred to the evidence, and the demurrer was sustained and judgment rendered for the defendant.

The court erred in sustaining the demurrer to the evidence. When a carrier undertakes to transport to a point beyond the terminus of its own line, or to a point not on its line, it will be responsible according to the terms of the contract of shipment, if it contain no prohibited exemptions, for loss or injury occurring upon the connecting lines as well as upon its own line, and the connecting carrier will also be responsible to the shipper for its own fault or negligence, and according to the terms of the shipper's contract with the contracting carrier. The connecting carrier, by receiving the goods from the contracting carrier, becomes its agent for the purpose of completing its contract with the shipper, and where, as in this case, the contract of the shipper contemplates the employment of connecting lines, the law will imply from this circumstance sufficient privity between the shipper and the connecting carrier to enable the shipper to maintain an action against such carrier on the contract. Hutchinson on Carriers, § 150. As the contract of the plaintiffs with the receiver was for the entire route,

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he could not stipulate for exemption from all liability beyond the terminus of his line. *Cinn. R. R. Co. v. Pontius*, 19 Ohio St. 221; s. c., 2 Am. Rep. 391; *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500. By simply accepting the stock from the receiver, Bond, to be transported to St. Louis, the defendant became entitled to claim the benefits of all valid exceptions he had made with the shipper. *Lawson on Carriers*, § 243. But in order to avail itself of them at the trial it was necessary that it should have set them up in its answer. *Oxley v. St. Louis, K. C. & N. R'y Co.*, 65 Mo. 629; *Clark v. St. Louis, K. C. & N. R'y Co.*, 64 id. 447. The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

All concur.

WALTER V. FORD.

(74 Mo. 195.)

Gift — delivery.

One in his last illness delivered a bank check to another with instructions to deliver it to a third on the drawer's death, and to return it to the drawer if he should recover. Nine days afterward the drawer died, and the check was delivered to the payee. *Held*, not a valid gift.*

PROBATE proceedings. The opinion states the case.

Rea, Heren & Son, for appellants.

Charles F. Booker, W. M. Caldwell and Bennett Pike, for respondent.

HENRY, J. This was a proceeding in the Probate Court of Andrew county by plaintiffs who are heirs at law of David Walter, to compel the administrator to inventory \$4,000 as assets of said estate. The following are the facts upon which they rely: On the 12th day of May, 1873, the deceased, David Walter, requested Ford to fill up four checks on the State National Bank for \$1,000 each, payable, one to Catharine M. Sigrist, one to Durham, one to

* See *Conner v. Snowden* (54 Md. 175), 39 Am. Rep. 258.

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Louisa Gicke, and the other to Ed. Walter. These checks were then signed by Walter, and delivered by Ford, with directions to him to deliver them to the parties in whose favor they were respectively drawn, if he, Walter, should die, but if he recovered, to return the checks to him. Ford held the check until the death of Walter, which occurred on the 21st of May, nine days after the checks were made, and then delivered them to the payees thereof, who drew the money on them at the bank.

The question is, were these valid as gifts *causa mortis*? In the 2d volume of his Commentaries, page 444, Chancellor Kent says: "Such gifts are conditioned like legacies, and it is essential to them that the donor make them in his last illness or in contemplation and expectation of death; and with reference to their effect after his death, they are good notwithstanding the previous will; and if he recovers the gift becomes void." Judge Story says: "To give it effect there must be a delivery of it by the donor, and it is subject to be defeated by his recovery, or escape from the impending peril of death." All the authorities agree that there must be an actual delivery of the subject of the gift by the donor. It only differs from a gift *inter vivos*, in that it is "defeasable by reclamation, the contingency of survivorship, or deliverance from peril." *Nicholas v. Adams*, 2 Whart. 17. Was there a delivery of the subject of the gift to the payees of the check by Walter in his life-time? His injunctions to Ford were that they were not to be delivered unless the donor died, and were to be held by Ford to be redelivered to the donor, if he recovered. Ford was the agent of Walter and bound to obey his instructions, and so doing, could not have delivered the checks to any one while Walter lived. If they had been given to Ford to be held for the payees at all events, the authorities cited to show that a delivery to an agent or trustee of the beneficiaries is a sufficient delivery, would be in point, but that is not this case. The checks were given to Ford, not to be delivered in the life-time of Walter, but after his death. It was in the nature of a testamentary disposition, and possessed none of the elements of a *donatio causa mortis*.

[Omitting minor inquiries.]

The judgment, which was for defendant, is reversed and the cause remanded, to be proceeded with as herein indicated.

Judgment reversed.

All concur.

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STATE V. BABER.

(74 Mo. 293.)

Criminal law — jury using intoxicating drink.

The use of intoxicating drink by a jury in a capital case after retirement will not vitiate the verdict unless it affected it, or the drink was supplied by an interested party. (*See note, p. 815.*)

CONVICTION of murder. The opinion states the case.

A. N. Merrick, and C. O. Bishop, for appellant.

D. H. McIntyre, attorney-general, for State.

NORTON, J. Defendant was indicted in the St. Louis criminal court for the crime of murder in the first degree, in killing Fredrika Schuendler, on the 14th day of August, 1879. He was tried and convicted of the offense charged, and on his appeal to the St. Louis Court of Appeals, the judgment was by that court affirmed, from which he appeals to this court.

[Omitting unnecessary facts.]

It is insisted that the court erred in refusing to grant a new trial because of alleged misconduct of the jury in the use of intoxicating liquors, and their being allowed to go into and through the jail in which persons criminally charged were confined.

The deputy sheriff who had the jury in charge stated in his affidavit "that when they were taken to their meals some of the jurors asked if they could take a drink before eating; that he replied that they could if they did not take too many; that some of them took whisky; some beer; but no juror took more than one drink at their meals; that in the evening after supper one or two of the jurors took with them each a pint bottle of whisky, for medical purposes more than any thing else; that it was utterly false that any of the jury drank to excess during the entire time he had them in charge; that the whole amount of whisky used by them in the two days he had them in charge was three or four pints." Mr. Hodnett, the sheriff, in his affidavit stated "that he never saw any juror take more than one drink at breakfast each day, and one drink at night before retiring, and that no juror manifested the least sign of intoxication, nor did any outsider furnish any liquor to any juror."

While cases may be found among the authorities from other States, to which counsel have cited us, which would have justified the trial court in granting a new trial because of any use, except medicinally, by a juror, of intoxicating liquors, a different, and I think a more reasonable rule obtains in this State, as will be seen by reference to the case of *State v. Upton*, 20 Mo. 397, where it was held that a verdict will not be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source or affected the verdict, Judge SCOTT observing that "we have never lent a willing ear to objections against verdicts growing out of irregularities in the conduct of jurors, unless such irregularities affected the verdict or were induced by the party obtaining it. Whilst the conduct of jurors cannot be too narrowly watched by the courts, yet if they do misbehave, if it cannot be seen that such misbehavior affected the verdict, it has been thought best to leave such misbehavior to the reprehension of the courts and to the punishment imposed by law for it, without disturbing the verdict. No court would be warranted in receiving a verdict against a prisoner from a jury, any member of which was in the least under the influence of intoxicating liquors. But to hold that a verdict should be set aside for the use of ardent spirits by the jury, not carried to an excess, when such spirits are not supplied from a source interested, or calculated to bias the minds of jurors, would be establishing a rule which would result in no practical good, and prove very burdensome to the parties." The doctrine announced in the above case was reiterated and approved in the case of *State v. West*, 69 Mo. 401; s. c., 33 Am. Rep. 506. Applying the principle of these cases to the facts in this case relating to the use of liquors by the jury, the action of the court in refusing to disturb the verdict on that ground is sustained.

[Omitting other matters.]

Judgment affirmed.

NOTE BY THE REPORTER — In *People v. Gray*, California Supreme Court, July 23, 1882, a capital case, the jury had in their room on tap and in daily use, three or four kegs of beer, and also consumed two demijohns of wine; and "two bottles of whisky at each meal, including breakfast," this was held not to be "suitable and sufficient food," and the consumption thereof was held to be improper conduct, calling for the setting aside of the conviction, although it did not appear that any jurymen was thereby unfitted for the discharge of his duty. One judge mildly observed, "it is sufficiently clear that some of them might quite naturally have been more or less under the influence of liquor while deliberating on the verdict." Another said, "there is strong reason to suspect this of one of the jurors." The case showed that all the drinking was done in about eight days.

FOX V. HALL

(74 Mo. 315.)

Deed — recording — quit-claim.

In the hands of an innocent purchaser for value a recorded quit-claim deed takes precedence of a prior unrecorded deed of the same premises from the same grantor.*

THE opinion states the case.

Wm. Heron, for appellant.

Vinton Pike, for respondent.

HOUGH, J. The chief question in this case is, whether one who takes a quit-claim deed, without notice of a prior unrecorded conveyance from the same grantor, acquires a good title. This precise question has never been passed upon by this court. The provisions of our statute requiring conveyances to be recorded, and declaring the effect of unrecorded deeds, are as follows :

Section 691. "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged, and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Section 693. "No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same be deposited with the recorder for record."

It has been held in several cases that where one takes a title to land, by quit-claim, which in the hands of the grantor is subject to equities to which the recording act does not apply, the grantee by quit-claim will take the land subject to such equities. *Stoffel v. Schroeder*, 62 Mo. 147 ; *Stivers v. Horne*, id. 473 ; *Mann v. Best*, id. 491 ; *vide also Oliver v. Piatt*, 3 How. 383 ; *May v. Le Claire*, 11 Wall. 232 ; *Springer v. Bartle*, 46 Iowa, 688. And in *Ridgeway v. Holliday*, 59 Mo. 444, a quit-claim deed from one

* See *Brown v. Banner Coal & Oil Co.* (97 Ill. 214), 37 Am. Rep. 105, and note, 102.

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whose title had been transferred by adverse possession, was held to pass no right as against the adverse occupant to whom such title had been so transferred, for the reason that such title by possession was not subject to the recording acts, and could not be recorded, and the grantee in the quit-claim deed took only what the grantor could lawfully convey. It has been repeatedly decided by this court that a grantee in a sheriff's deed, made in pursuance of a sale under execution, is a purchaser within the meaning of the recording act, and it is equally well settled that by virtue of such conveyance he takes only such interest as the judgment debtor had. *Draper v. Bryson*, 26 Mo. 108 ; *Dickson v. Desire's Admr.*, 23 id. 166 ; *Mann v. Best*, 62 id. 491. In other words, a grantee in a sheriff's deed acquires precisely the same rights which he would have acquired by a quit-claim deed from the judgment debtor, except in cases where the judgment debtor has made fraudulent conveyances before judgment, in which cases the purchaser at execution sale acquires the additional right to set such conveyance aside. Numerous decisions lay down the rule that a *bona fide* purchaser of property who has failed to record his deed until after a judgment has been recovered against his vendor, but who records it prior to sale under the judgment, can hold it against the person purchasing under the judgment. *Davis v. Ownsby*, 14 Mo. 170 ; *Valentine v. Havener*, 20 id. 133 ; *Stillwell v. McDonald*, 39 id. 282 ; *Potter v. McDowell*, 43 id. 93 ; *Reed v. Ownby*, 44 id. 204 ; *Black v. Long*, 60 id. 181.

These cases all proceed upon the theory that unless the conveyance of the judgment debtor be recorded before the sale under execution, the purchaser at such sale, if he have no actual notice of such conveyance, will acquire the title. We are of opinion that the principle established by the cases cited is applicable to the case at bar, and that a grantee for value in a quit-claim deed, with the exception above noted, acquires the same rights against an unrecorded deed, of which he has no actual notice, as a purchaser at execution sale. In the case of *Chapman v. Sims*, 53 Miss. 154, this question is ably and learnedly discussed, and the same conclusion reached which is announced in this opinion. Similar rulings have been made in the States of Illinois and Iowa. *McConnel v. Reed*, 4 Scam. 117 ; *Pettingill v. Devin*, 35 Iowa, 353.

In the present case however it does not appear that the plaintiff, who claims under the quit-claim deed from Hopkins the common source of title, ever paid or became absolutely bound to pay any

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thing for said deed. Hopkins was indebted to him, and he agreed, as a consideration for the deed, to credit Hopkins on his indebtedness with the stipulated value of the land, when he got possession of the land. The plaintiff himself testified that he paid nothing when he took the deed, had paid nothing since, that he had never had possession of the land, and had never given Hopkins any credit on his indebtedness on account of the land. Now the plaintiff is not entitled to the protection of the recording act unless he has parted with something of value. This protection is only afforded to an innocent purchaser for value. *Davis v. Ownsby*, 14 Mo. 170, 176; *McCamant v. Patterson*, 39 id. 110; *Aubuchon v. Bender*, 44 id. 564. The judgment of the Circuit Court, which was for the defendant, must therefore be affirmed.

Judgment affirmed.

The other judges concur.

HARRISON V. MISSOURI PACIFIC RAILWAY COMPANY.

(74 Mo. 284.)

Agency — railway company and station agent.

A railway station agent, authorized to receive and forward freight, has implied authority to contract to furnish a certain number of cattle cars at his station, on a specified day, the shipper being ignorant of any limitation of such power.

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

Thos. J. Portis, E. A. Andrews and H. S. Priest, for appellant.

Alexander Graves and Belch & Silver, for respondent.

NORTON, J. This is a suit instituted in the Circuit Court of Lafayette county by a petition which substantially alleges that plaintiff, who was a dealer in and shipper of cattle to St. Louis, on or about the 23d day of June, 1877, entered into a verbal contract with defendant, whereby defendant agreed and bound itself to receive and ship 194 head of plaintiff's cattle from Lexington to St. Louis on Monday, the 25th day of June, 1877, and for that pur-

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pose defendant expressly agreed and bound itself to furnish thirteen stock cars at its depot in Lexington on the day and year last aforesaid ; that defendant entered into said contract with full knowledge that plaintiff was shipping said cattle to St. Louis for the purpose of selling the same on speculation ; that defendant wholly failed to furnish the said thirteen cars on the 25th day of June, 1877, and would not and did not provide plaintiff any means for the transportation of said cattle, and would not receive said cattle for transportation till Tuesday evening of June 26, 1877 ; that if plaintiff's cattle had been received and shipped in the cars agreed to be furnished on the 25th day of June, they would have reached St. Louis on the 26th day of June, 1877, but that in consequence of defendant's said failure the cattle did not reach St. Louis till the evening of the 27th day of June ; that on the 26th day of June plaintiff's cattle were worth in St. Louis six and a half cents per pound gross, and were only worth on the evening of the 27th five and a half cents per pound ; that by reason of defendant's failure to furnish cars on the 25th day of June and ship as agreed, plaintiff had sustained that loss as well as loss for extra shrinkage of the cattle while detained at Lexington and extra expense incurred in caring for them, for all of which he asked judgment.

The defendant's answer is as follows : Defendant denies each and every allegation in said petition contained ; and for other and further answer and defense herein defendant says, that any damages sustained by the plaintiff in this case were the result of his own negligence and careless acts and conduct, and want of proper care and prudence, directly contributing to produce the same. And for other and further answer and defense herein defendant says, that by the rules, regulations and directions of the defendant, in force at the time the said contract to furnish cars to plaintiff was made, as he alleges, adopted, issued and published for the information and government of defendant's agents, and the shippers of live stock and other freights over defendant's railroad, and well known to this plaintiff and his agents, or which might by the exercise of ordinary care and prudence have been known, it was provided "that no agent of the company is authorized to agree to furnish cars for live stock, grain or other freight at any specified time, and will make requisition for cars in the order in which shippers have applied for them, and when received will distribute them in like manner." And defendant further avers that any alleged

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contract between the plaintiff herein, and any agent or agents of defendant to furnish him cars for the shipment of live stock at any particular place or any given or stated time, was in violation of such rules and regulations, and was null and void and in no manner binding upon the defendant. And for other and further answer and defense herein defendant says, that the cars were prevented from arriving at Lexington at the time plaintiff wished them to be there by an unavoidable accident and delay.

[Minor matter omitted.]

The action of the court in striking out of defendant's answer the following words, "or which might by the exercise of ordinary care and prudence have been known," is also assigned for error. As will be seen from the answer it avers "that the station agent had no authority to make the contract sued upon, and that plaintiff knew the fact, or might by the exercise of ordinary care and prudence have known it." It may, we think, be safely affirmed that a station agent clothed with the power, and whose duty it is to receive and forward freight, who makes a contract within the scope of his apparent authority, thereby binds the company he represents, although in making such contract he may have exceeded his authority; and when such company seeks to absolve itself from liability arising under such contract on the ground that the agent, although apparently authorized to make it, in fact had no such authority, it must show that the party with whom the contract was made had knowledge of the fact that the agent was acting beyond his authority. This principle is sanctioned by the following authorities: 2 Redf. on Rail., p. 113; Story on Agency, §§ 127, 443; *Pruitt v. H. & St. Jo. R. R. Co.*, 62 Mo. 540; *Northrup v. Ins. Co.*, 47 id. 439; *Deming v. Railroad Co.*, 48 N. H. 455; s. c., 2 Am. Rep. 267; *Wilson v. Railway*, 18 Eng. L. & Eq. 557, 559; *Baltimore & Ohio R. R. Co. v. Brady*, 32 Md. 333; *Kerr v. Willan*, 2 Stark. 48. In the last case cited it was expressly held that where a carrier sought to charge plaintiff with knowledge of a notice painted on a board and hung up in the carrier's office, limiting the carrier's liability, it was not sufficient to show that such notice was put up, and that plaintiff's agent, who could read, saw the notice and might have read it but in fact did not read it, Lord ELLENBOROUGH observing: "If the person who carried the goods to the office in this case had read the notice, the plaintiff would have been bound by it; but he

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did not read it, and consequently the plaintiff was not bound by the limitations it contained."

[Other matter omitted.]

The instructions given presented the matters in issue fairly to the jury, and the judgment will be affirmed, with the concurrence of the other judges, except RAY, J., who did not sit, he having been of counsel in a cause submitted with this case involving similar questions.

Judgment affirmed.

STATE v. ELLIS.

(74 Mo. 335.)

Criminal law — incest — ignorance.

In incest, one party having knowledge and the other being ignorant of the relationship, the former may be convicted and the latter acquitted.*

CONVICTION of incest. The opinion states the case

C. O. Bishop, for appellant.

D. H. McIntyre, attorney-general, for State.

HENRY, J. The defendant was indicted for incest, and found guilty at the March Term, 1881, of the St. Louis criminal court, and the judgment of that court having been affirmed by the Court of Appeals, he has appealed to this court. The alleged incest was the commission of fornication with Mary Belle Ellis, his daughter, and she testified that he had frequently had sexual connection with her, but that "he made her do it;" and that "she did not tell of it because afraid that he would beat her — that he threatened to beat her if she told any one." At the time of the connection alleged in the indictment she was over twelve years of age. The crime alleged is punishable by imprisonment in the penitentiary for a term not exceeding seven years. The court instructed the jury that: "If defendant is the natural parent of the girl, Mary Belle Ellis, and at, etc., * * he did feloniously and incestuously

* See *Com. v. Bakeman*, ante, 248.

commit fornication with her, by actually, and with full knowledge of the relationship, etc., having carnal knowledge of her person, whether with or without her consent, you will find him guilty of incest."

[But on another point]

We do not hold it necessary that both parties must be guilty of the crime of incest before the guilty one can be convicted. For instance, if in this case, the defendant was aware of the relationship between him and Mary Belle, and she was ignorant of it, he would be guilty and punishable under the statute, if the illicit connection was by mutual consent, although she could not have been guilty of incest because ignorant of the relationship existing between her and the defendant. Whether the defendant had sexual intercourse with his daughter with her consent was a question which should have been submitted to the jury, with a direction to convict, if satisfied that she consented, and to acquit the defendant if he forced her to submit.

Judgment is reversed and the cause remanded.

Judgment reversed.

All concur, except NORTON, J., who dissents.

STATE V. MOORE.

(74 Mo. 412.)

Office and officer — county treasurer — loss of funds — public enemies.

A county treasurer is liable for loss of the county funds deposited by him generally in a bank, although the bank was reputed solvent, and such deposit was necessary for the safety of the funds.*

Thieves, tramps and robbers are not "public enemies" within the rule exempting bailees.

ACTION on a county treasurer's bond. The opinion states the case. The defendant had judgment below.

Smith & Krauthoff, for appellant.

Glover & Shepley and *Virgil M. Harris*, for respondent.

* See *York Co. v. Watson* (15 B. C. 1), 40 Am. Rep. 675.

NORTON, J. The State, on relation of Mississippi county, sued James S. Moore and Joseph C. Moore on a bond given by James S. Moore, as treasurer of said county, November 9, 1878, in the penalty of \$20,000. The bond was conditioned that James S. Moore should perform all the duties of said office. The petition alleged that the law required the treasurer, at the expiration of his term of office, to pay over to his successor all moneys in his custody, as treasurer, belonging to the plaintiff; and that said Moore received as treasurer, \$2,996.90 during his term of office, belonging to plaintiff, and has failed and refuses to pay over to his successor said \$2,996.90, and prayed judgment for said sum.

The defendants answered that at the time said moneys came to the possession of the treasurer, Mississippi county was not, nor for a long time thereafter, a safe place to keep such large sums of money; that it was then, and has been since, overrun with thieves and tramps, and overpowering public enemies, and the dwelling houses and other buildings there were unfit and unsafe for keeping money; that the County Court made no provision for an iron safe, with locks or other means of safe custody of county funds; that ordinary prudence required the treasurer to deposit said money in a safer place than could be found in said county; that no business man was willing to keep, or did keep, any large sum of money in said county; that in this emergency, the treasurer, after strict inquiry as to the safety and solvency and faithful management of the "North St. Louis Savings Association," a bank in the city of St. Louis, deposited the money claimed in this suit in said bank — in which bank the said James S. Moore deposited his own funds, and the wealthiest and most prudent merchants deposited their funds — making said deposit in the name of James S. Moore, treasurer of Mississippi county; that said deposit was made with the knowledge and assent of, and without objection by, the Mississippi County Court; that while said money remained in said bank it failed, and said money was lost after the utmost care of the treasurer, and by unavoidable misfortune. To this answer a replication was filed, putting in issue the facts alleged, but on the trial it was agreed that all the facts of and concerning the controversy were fully and correctly set out in the petition and answer. The court rendered judgment for defendants, and plaintiff brings the case here by appeal.

The condition of the bond sued upon was that defendant, as

county treasurer, "shall faithfully perform all the duties of his said office." These duties are prescribed by law, and are as follows: "To receive all moneys payable into the treasury of the county, and disburse the same on warrants drawn by order of the County Court; to keep a just account of all moneys received and disbursed; to deliver over to his successor in office all things pertaining thereto, together with all moneys belonging to the county." When therefore the defendant as treasurer of the county bound himself to perform, faithfully, "all the duties of his said office," he assumed, among others, an obligation to deliver to his successor in office, "all things pertaining thereto, together with all moneys belonging to the county," as much so as if it had been specifically incorporated in the bond.

In this suit defendant is sought to be made liable for non-compliance with his agreement to deliver, or pay over to his successor in office, the sum of \$2,996.90, money belonging to the county. The defendant and treasurer answers that he ought not to be held to his obligation, because, in consequence of Mississippi county being overrun with tramps, thieves, robbers, public enemies, money could not be safely kept in said county; and for the purpose of keeping it safely, he deposited it to his credit, as treasurer, in a bank in St. Louis, which failed, whereby the money was wholly lost. Such an answer as this, we think, is insufficient to shield defendant from liability in any view which can be taken of the case. If the obligation assumed by defendant, in his bond, to deliver over to his successor in office all money belonging to the county, can only be met or discharged by making such delivery or payment, it is clear that the facts set up in the answer, and admitted to be true, constitute no defense. That the above rule is the correct one governing in such cases is established by the following authorities, approvingly cited by this court in the case of *State v. Powell*, 67 Mo. 395; s. c., 29 Am. Rep. 512; *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 id. 154; *U. S. v. Dashiell*, 4 Wall. 185; *U. S. v. Keebler*, 9 id. 83; *Boyden v. U. S.*, 13 id. 17.

If on the other hand under the rule laid down in the case of *U. S. v. Thomas*, 15 Wall. 337, defendant is to be regarded as a bailee and exempt from liability to pay when the loss is occasioned by the act of God or a public enemy, he would still be liable under the facts stated in the answer, because they show that the loss was not occasioned in either of these ways. The tramps, thieves and rob-

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bers, which it is alleged overran Mississippi county, while they are enemies to the peace and safety of the public and social order, are not public enemies in the legal sense of these words. "By enemies is to be understood public enemies, with whom the nation is itself at open war; and not merely robbers, thieves and other private depredators, however much they may be deemed in a moral sense at war with society. Losses therefore which are occasioned by robbery on the highway, or by the depredations of mobs, riots, insurgents and other felons, are not deemed losses by enemies within the meaning of the exception." Story on Bail. (9th ed.), § 526; Angell on Carriers, § 200; Hutch. on Carriers, §§ 204, 205.

Besides this, the facts agreed upon show that defendant made not a special but general deposit of the money to his credit as treasurer. Under the authority of the case of the *State v. Powell*, 67 Mo. 395; s. c., 29 Am. Rep. 512, by making such deposit "the bank simply became indebted to him in his official capacity, and he took the risk of being able to collect it when he required it." Judgment reversed and cause remanded, to be proceeded with in conformity to this opinion.

Judgment reversed and cause remanded.

All the judges concur.

RUSSELL V. INHABITANTS OF TOWN OF COLUMBIA.

(74 Mo. 480.)

Municipal corporation — negligence — defect in street.

A gas company in a town had obtained the consent of the town authorities to lay its pipes in the street upon agreeing to leave the streets in good condition and not unnecessarily to allow ditches to be left open. In so laying pipe it allowed a ditch to remain open for several days. The plaintiff fell into the ditch at night and was hurt. *Held*, that an action would lie against the town.

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

Overall & Judson, Wm. J. Howell, Gordon, McIntyre & Kennan, for appellant.

Guitar & Douglass, and Macfarlane & Trimble, for respondents.

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HENRY, J. This suit was instituted in the Boone Circuit Court by plaintiff to recover damages for an injury sustained by her from falling into a ditch made by the Columbia Gas & Coke Company, along Broadway street in said town and on a bridge in said street.

The accident occurred on the bridge on the night of August 13, 1876, as plaintiff was returning from church with her escort. The ditch or trench for about fifteen feet east of the bridge and on the bridge, was left open from the 11th to the 14th of August, and witnesses for defendant testified that on the night of the 13th, as on previous nights, a red light was placed about twenty feet east of the bridge, and that it remained there lighted until the morning of the 14th. There was testimony for plaintiff to show the contrary. The plaintiff resided with her father southwest of the bridge; one witness says 150 feet, another 150 yards, and a third from 280 to 290 feet; but whatever the distance may be, there is no question that the bridge could be seen from Col. Russell's residence, and probably also the trench on the bridge; but plaintiff testified that she never saw the trench on the bridge, although she saw the gas company digging the trench in Broadway street. She started alone to the Episcopal church, east of the bridge on Broadway on the night of the 13th, about, or a little after dusk, and fell in company with the rector and his wife at the bridge; but says she was engaged in conversation with them and did not see the trench. It was a dark night, and returning from church, between ten and eleven o'clock, the accident occurred.

The Columbia Gas & Coke Company was organized under the 7th article of the general corporation law, by the 14th section of which any corporation formed under that article, for the purpose of supplying any city, town or village with gas, * * * has the power to lay conductors for conveying gas through the streets * * * of any such city, town or village, with the consent of the municipal authorities thereof and under such reasonable regulations as the authorities may prescribe. Wag. Stats., p. 336. The town of Columbia passed an ordinance giving to said Gas & Coke Company the right to lay gas pipes along any street or alley, provided the same shall be left in good condition and the ditches not be left open any longer than necessary to lay or repair pipes. On the 21st day of November, 1872, the said company, in writing, accepted the rights, etc., granted by said ordinance.

The injury to plaintiff was a sprain of the ankle, and was a seri-

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ous and painful affliction, confining plaintiff to the house from August to November. There was evidence tending to prove that the sprain was improperly treated by the physicians, and was in consequence more serious than it would otherwise have been; and also that plaintiff in November and subsequently danced in quadrilles and waltzes, which aggravated the injury and retarded recovery.

The cause was tried in the Audrain Circuit Court on change of venue, and plaintiff obtained a judgment for \$2,800, from which defendant has appealed.

[Omitting instructions and requests.]

The town of Columbia is bound to keep its streets free from obstruction, and reasonably safe for travel in the usual modes, and is liable for an injury by a neglect of this duty. *Blake v. St. Louis*, 40 Mo. 569; *Bassett v. St. Joseph*, 53 id. 290; s. c., 14 Am. Rep. 446; *Welsh v. St. Louis*, 73 Mo. 71; 2 Dill. Mun. Corp. (2d ed.), § 1024. Nor can this duty be evaded, suspended or cast upon others by any act of its own. 2 Dill. Mun. Corp., § 1027, and authorities above cited. If a defect in a street be occasioned by accident, or by the wrongful and unauthorized act of a third person, the liability of the city does not begin until it has notice of the defect, or until it has existed for such a length of time that ignorance of its existence is inexcusable. It is in such cases that the authorities cited by counsel of respondent, with respect to notice of the defect, are applicable. "Where streets have been rendered unsafe by the direct act, order or authority of the municipal corporation (not acting through independent contractors), no question has been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, when the person suffering them is without contributory fault, or was using due care. Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others, but as in such cases the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability." 2 Dill. § 1024. I have quoted thus extensively from this author, for the reason that in that paragraph the

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distinction between the cases in which notice of the defect is required, and those in which it is not, is clearly taken.

In *Bassett v. St. Joseph*, 53 Mo. 298; s. c., 14 Am. Rep. 446, the court observed: "All of the evidence in the present case shows most clearly that excavation was either extended into the highway a few feet or came up to the edge of the highway. In such cases, if it renders travel dangerous, it is as much the duty of the city to protect the public against the danger in the one case as in the other, and it makes no difference in such case, whether the excavation was made by the city, or by another, except when not made by the authorities of the city, they would not be liable until after they had notice of the dangerous condition of the street." This is a recognition of the distinction. Here the trench having been dug by a company, to which the town of Columbia had given permission to make it, and which permission it was at liberty to withhold, the liability of the corporation is the same as if it had been made by its own servants, by its direction.

Barry v. St. Louis, 17 Mo. 121, which held a contrary doctrine, has been overruled by *Welsh v. St. Louis*, *supra*, and while adjudications in line with *Barry v. St. Louis*, are to be found in some of our sister States, yet in others the doctrine more recently announced by the court on that subject is maintained. In *Storrs v. Utica*, 17 N. Y. 104, the plaintiff drove his team into a sewer excavated in a street of said city, and sued the city for damages. The defense was that the excavation was made by one Shippy, under a contract with the city. This was held no defense, the court remarking: "Although the work is let out by contract, the corporation remains charged with the care and control of the street in which the improvement is carried on. The performance of this work necessarily renders the street unsafe for night travel. This is a result that does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the streets, the corporation which has authorized the work is plainly bound to take those precautions."

The contract between Shippy and the city contained no stipulation in respect to any precautions for the security of travellers, and while the ordinance which permitted the gas company to make the trench in question in this case required the company to keep the

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street in good condition, and not to leave the ditch open any longer than necessary for laying or repairing pipes, we do not think that that exempted the city from liability. It authorized the digging of the trench, and knew that the work was in progress. In *Storrs v. Utica*, 17 N. Y. 104, the court observed the charge of the judge was correct "unless it be in the apparent concession that a municipal corporation can avoid the duty in question, and the consequent liability to persons who suffer injury from its neglect, by bringing the contractor into a stipulation that he will perform such duty."

The case of *Kelly v. Mayor of New York*, 11 N. Y. 433, was one in which the city had employed one under an ordinance to grade a space thirty feet wide through the center of a street, and by the contract the contractor was to erect a fence across the end of the work, and during the night to keep sufficient lights on and near the work, and to take all other precautions to prevent accidents and injuries to persons and property, and to indemnify the city against all loss or damage by reason of any neglect or unskillfulness in the execution of the work, which was to be done under the direction and to the satisfaction of certain officials of the corporation having charge of the work. The plaintiff's horse was struck and injured by a stone thrown from a blast set off on said street while plaintiff was driving along a road in its vicinity.

The question there presented was a very different one from that we are considering. Plaintiff in that case was not injured on the street, or by any defect in the street. The city, so far as travellers were concerned, had discharged its duty, and the injury complained of was done by the carelessness of the servant of the contractor in making the blast, and the contractor and not the city was held liable. *Storrs v. Utica* was decided subsequently, and *Kelly v. Mayor* was cited and approved. *Pack v. Mayor of New York*, 4 Seld. 222, was similar to *Kelly v. Same*, and in *Storrs v. Utica*, the court said that in those two cases "the general doctrines, so well set forth in *Blake v. Ferris* were applied with entire precision," expressing a doubt however whether they had been so applied in *Blake v. Ferris*, 1 Seld. 48.

In support of the foregoing general views are *Hincks v. Milwaukee*, 46 Wis. 565; s. c., 32 Am. Rep. 735; *Detroit v. Corey*, 9 Mich. 165; *Mayor v. Waldner*, 49 Ga. 316; *Willard v. Richardson*, 3 Gray, 349; *City of Springfield v. Le Claire*, 49 Ill. 476. In

the latter case it was observed by the court that : " There is no charge, in the declaration, of negligence in not keeping the street in repair, but for permitting the work to be carried on in the street, dangerous in itself, without proper safeguards, and which they neglected to supply. The injury complained of was not the result of a defective street, which a traveller upon it might have noticed and reported, but for permitting the sewer to be excavated in a manner hazardous to the safety of the people."

The instructions given by the court recognized the principles herein stated.

The instructions asked by defendant and refused were properly refused. The first was to the effect that if the gas company was not the defendant's servant in making the ditch, etc., plaintiff could not recover. The second was properly refused because the doctrine of notice has no application to the case.

[Omitting minor questions.]

Judgment affirmed.

All concur.

STATE V. WILFORTH.

(74 Mo. 523.)

Constitutional law — concealed weapons.

A statute prohibiting the carrying of concealed weapons is not unconstitutional.
(See note, p. 832.)

CONVICTION of carrying concealed fire-arms. The opinion states the point.

Wm. M. Morgan, for appellant.

D. H. McIntgre, attorney-general, for State.

NORTON, J. Defendant was indicted at the May Term, 1877, of the Circuit Court of Cape Girardeau county for going into a church house in said county where people were assembled for literary purposes, viz. : for the purposes of a school exhibition, the said defendant having about his person fire-arms, the said defendant not being a person whose duty it is to bear arms in the discharge

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of duties imposed upon him by law. On the trial defendant was convicted and fined \$10, and the cause is here on his appeal.

[Minor points omitted.]

It is also insisted that the statute on which the indictment was framed is in conflict with the 2d article of amendments to the Constitution of the United States, which declares "that the right of the people to keep and bear arms shall not be infringed." The statute which gave origin to the indictment (Acts 1875, § 1, p. 50) is directed against the practice of carrying concealed weapons or fire-arms, and the pernicious consequences flowing from such a practice. In Kentucky it has been held that any statute which denies to the citizen the right to carry arms, whether openly or concealed, is an infringement of the right guaranteed by the Constitution. *Bliss v. Commonwealth*, 2 Litt. 90 (13 Am. Dec. 251). The same doctrine prevails in Tennessee. On the other hand, in the States of Georgia, Louisiana, Arkansas, Indiana and Alabama, it has been held that a statute making it a misdemeanor for a person to carry concealed weapons was not obnoxious to said constitutional provision. *Nunn v. State*, 1 Kelly (Ga.), 243; *State v. Jumel*, 13 La. Ann. 399; *State v. Buzzard*, 4 Ark. 18; *State v. Mitchell*, 3 Blackf. 229; *Owen v. State*, 31 Ala. 387; *State v. Reid*, 1 id. 612. In the last case above cited, in the disposition of the question, it was observed that "the Constitution, in declaring that every citizen has the right to bear arms in defense of himself and the State, has neither expressly nor by implication denied to the legislature the right to enact laws in regard to the manner in which arms should be borne. We do not desire to be understood as maintaining that in regulating the manner of bearing arms the authority of the legislature has no other limit than its own discretion. A statute which under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for purposes of defense, would be clearly unconstitutional. But a law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution." Whether such statutes are or not in conflict with the Federal Constitution, is an open question so far as the Federal courts are concerned, the question never hav-

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the nature of narrative is to be carefully excluded." *Bacon v. Inhabitants of Charlton*, 7 Cush. 586 ; and in *Lund v. Inhabitants of Tyngsborough*, 9 id. 42, the same court said : ' There must be a main or principal fact, or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it.' In *Luby v. Hudson R. R. Co.*, 17 N. Y. 133, the Court of Appeals observes : " The declarations of an agent or servant do not in general bind the principal. Where his act will bind, his statements and admissions, respecting the subject-matter of those acts, will also bind the principal, if made at the same time and so that they constituted a part of the *res gestæ*. To be admissible, they must be in the nature of original, and not of hearsay evidence ; they must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time." These general principles are recognized by all the cases on the subject, and the conflict between them has arisen in the application of the principles to the facts of the particular case.

The observations above quoted from the opinion of the New York Court of Appeals were made in a case strongly resembling the case at bar. The defendant was sued for negligently running a railroad car, drawn by horses, against the plaintiff, in one of the streets of the city of New York. A police officer was allowed to testify that he arrested the driver directly after the accident, the citizens having stopped the car, and the driver having got outside the crowd which had gathered, and on being arrested, assigned as a reason why he did not stop the car that the brakes were out of order. The Court of Appeals held it error to admit the testimony, and observed that : " The alleged wrong was complete, and the driver when he made the statement was only endeavoring to account for what he had done. He was manifestly excusing himself and throwing the blame on his principal." Here the servant who remarked to his fellow-servant : " If you had stopped the train when I told you, you would not have killed him," was only endeavoring to exculpate himself and throw the blame on his fellow-servant, and neither his remark nor the reply to it by the other was made in the prosecution of the business of their employer, nor did they immediately precede or accompany the act which led

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to the catastrophe, or constitute any part of that act, but if admissible at all would only go to show another fact, and were not of themselves facts to be proved as "verbal acts." They were only intended to prove another fact.

The cases of *Insurance Co. v. Mosley*, 8 Wall. 397; *Comm. v. McPike*, 3 Cush. 181, and *Brownell v. Mo. Pac. R'y Co.*, 47 Mo. 243, relied upon by respondent's counsel, were not cases in which the declarations of agents were introduced as evidence, but the declarations offered and received were made by the persons injured, or by persons laboring under some disease, and the statements related to the cause of, or to the persons who had inflicted the injury, or to the symptoms and suffering of the invalid. It may be observed of the case of the *Insurance Co. v. Mosley*, that Mr. Justice CLIFFORD delivered a very able dissenting opinion, concurred in by Justice NELSON. The case of *Comm. v. McPike*, has by more recent decisions of the Supreme Court of Massachusetts been questioned and qualified, if not overruled. See cases *supra*. And the case of *Brownell v. Pac. R'y Co.* has never been satisfactory to the bar or bench of this State. The case of *Comm. v. Hackett*, 2 Allen, 137, is distinguishable from *Brownell v. Pac. R'y Co.*, and *Comm. v. McPike*. The facts of that case were, that Gillen was stabbed in the night-time by one who immediately ran away, and the evidence offered was that Gillen at the moment he was stabbed cried out: "I'm stabbed," and a witness for the Commonwealth testified that he heard the exclamation and at once went to Gillen and reached him within twenty seconds after the exclamation, and was asked: "When you got to Gillen what did he say?" His answer was: "He said I'm stabbed; I'm gone; Dan. Hackett has stabbed me." The Supreme Court said: "If it was a narrative statement wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and *who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted.*" That portion of the opinion which we have italicised indicates the precise ground upon which the evidence was held admissible.

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Strictly applying the principles above announced, and "it is dangerous to open the door to declarations of agents beyond what the cases have already done;" was the evidence offered in the case at bar admissible? Were the declarations connected with the calamity as a cause or concomitant? Were they contemporary with the principal transaction, and illustrative of its character, or merely a subsequent narrative how it occurred or an explanation of how it might have been avoided? If the latter, as we think, they were wholly inadmissible, and the court erred in permitting the evidence to go to the jury.

It is not to be denied that some of the authorities cited by respondent's counsel, and others not cited, sustain his position. With few exceptions they are not cases however in which the question of agency was involved, but cases in which the declarations offered were those of persons injured, as to the causes of, or to the persons who inflicted the injuries, and while there may be circumstances which would warrant a less rigorous application of the principle, in such cases we are satisfied that a strict adherence to principle is the better course when it is sought to charge a master for the acts of his servant; and where there is such a conflict of authority on a subject, we are inclined to be guided by principle, rather than follow adjudications which have departed from it, in the apparent necessity for a departure in the given case. If in the present instance the train could have been stopped after deceased was discovered on the trestle by defendant's servants, that fact can be proved by legitimate testimony. The servants who made the declarations offered in evidence are competent witnesses for plaintiff to prove that her husband was seen on the trestle by the servants managing the train, and that the train could have been stopped before it reached him. It is no answer to this that plaintiff could not rely upon them because they were in defendant's employment. We are not to assume, in order to admit incompetent evidence, that the only person to whom the fact to be proved is known would commit perjury. If plaintiff cannot prove by competent testimony a fact essential to her recovery, we cannot establish a rule in her favor, which in a hundred other cases would probably lead to manifest injustice.

[Minor matter omitted.]

For the error committed in admitting the declarations of the defendant's servants, the judgment is reversed and the cause remanded.

Reversed and remanded.

All concur except RAY, J., absent.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

**HOFFMAN V. NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY.**

(87 N. Y. 28.)

Master and servant — course of employment.

A boy eight years old jumped upon the steps of a passenger railway car and sat on the platform, to steal a ride. The conductor or brakeman kicked him off the car while the train was moving some ten miles an hour, and he was injured. *Held*, that a recovery against the railway company was warranted. (*See note, p. 840.*)

ACTION for personal injuries. The head-note states the facts. The plaintiff had judgment below.

Samuel Hand, for appellant.

Nelson Smith, for respondent.

ANDREWS, C. J. The jury have found that the plaintiff was kicked from the car while in motion, by the conductor or brakeman. There was a very sharp conflict of evidence upon this question. The testimony of the conductor and brakeman, and of a

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by-stander tended strongly to show that neither the conductor nor brakeman touched or said any thing to the plaintiff, and that he and other boys jumped off the platform of the car as the brakeman came out of the door.

It is not claimed that the finding of the jury upon this issue is unsupported by evidence, and the point is not raised by any exception, but it is insisted that the act of kicking a boy from a car while in motion, assuming that it was done by the conductor or brakeman, was not within the scope of any authority conferred by the defendant upon the person in charge of the train, but was an illegal, wanton, and willful act, for which the employer is not responsible.

By the general regulations adopted by the defendant, in force at the time of the transaction in question the conductor has charge of the train, and is responsible for its safe and proper management, and brakemen, and other servants thereon, are subject to his orders. He is authorized to remove from the car persons who refuse to pay their fare, or are drunk, riotous, or unruly; but the regulations declare that in exercising this authority he must be governed by the provisions of law. The only provision of law on the subject is found in section 35 of the General Railroad Act (Laws of 1850, chap. 140), which provides that if any passenger shall refuse to pay his fare, it shall be lawful for the conductor to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling-house, on stopping the train. The regulations defining the duties of brakemen, introduced by the defendant, are not printed in the case, and there is no proof before us of any specific authority given to brakemen to remove trespassers from the cars. It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not is implied, and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train concerned in its management, and fully cognizant of the obvious fact that intruders, who jump upon the trains for a ride, without intention of becoming passengers, are wrongfully there. Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action against him for the assault, that he was brake-

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man, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience. But assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains, whether when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car, while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless, and illegal; but the point is, was the act within the scope of the employment and authority? If it was, and the servant in doing what he did undertook to act for the company, and not for himself or for his own ends, the company is not exonerated, although the servant may have deviated from instructions in executing the authority, or may have acted without judgment, or even brutally. The removal of trespassers from the cars, was, as we hold, within the implied authority of the defendant's servants on the train. The fact that they acted illegally in removing the plaintiff while the train was in motion does not exonerate the defendant. In some cases, where the existence of an authority in the servant to do a particular act is in controversy, and the authority is sought to be established by inferences and implications, it may be a material circumstance bearing upon the non-existence of the authority sought to be implied, that the act was one which the master could not do himself, without a violation of law. But this fact would not be decisive. No doubt the kicking of the boy off the car was not only wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant, to exercise proper care in executing the authority confided to them; but in most cases, where the master has been held liable for the acts of a servant, the tortious act was a breach of the servant's duty. In this case the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own. The general subject has been recently considered in this court, and it is unnecessary further to elaborate it. *Higgins v. Waterliet*

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Turnpike Co., 46 N. Y. 23 ; s. c., 7 Am. Rep. 293 ; *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129 ; s. c., 21 Am. Rep. 597. We think the court would not have been justified in taking the case from the jury.

[A minor matter omitted.]

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—See note, 40 Am. Rep. 296 ; *Quinn v. Power*, post. In *Chicago and Eastern Railroad Co. v. Flexman*, 108 Ill. 548, a passenger on a railway train arriving at the place to which he had paid his fare missed his watch, and supposing it to have been stolen, refused to leave the train until he should recover it, and the conductor consented that he might remain on the train until it reached another station, and after the train had started and a partial search had been made, a passenger asked who he thought had his watch, when he replied, "That fellow," pointing at a brakeman, who immediately struck him in the face with a lantern. *Held*, that the facts showed a right of action against the railroad company. The court said : "But it is said, 'that if the plaintiff was injured by a servant of appellant, it was an act outside of the employment of the servant who committed the act, and not in furtherance of his employment by the master.' This position is predicated upon *McManus v. Cricket*, 1 East, 106, and like cases which have followed it. In the case cited Lord Kenyon said : 'It is laid down by Holt, C. J., as a general position, that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt, his master will not be answerable for such act.' The doctrine announced is no doubt correct when applied to a proper case. If for example, a conductor or brakeman in the employ of a railroad company should willfully or maliciously assault a stranger—a person to whom the railroad company owed no obligation whatever—the master in such a case would not be liable for the act of the servant ; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented—one which rests entirely upon a different principle

"What are the obligations and duties of a common carrier toward its passengers ? In *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608, it was held that a steamboat company, as a carrier of passengers for hire, is through its officers and servants bound to the utmost practicable care and diligence to carry its passengers safely to their place of destination, and to use all reasonably practicable care and diligence to maintain among the crew of the boat, including deck hands and roustabouts, such a degree of order and discipline as may be requisite for the safety of its passengers. The same rule that governs a steamboat company must also be applied to a railroad company, as the duties and obligations resting upon the two are the same, or any other company which carries passengers for hire. In *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202 ; s. c., 2 Am. Rep. 89, in discussing this question, the court says : 'The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully ; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed—if this protection is not furnished—but on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible.' In *Bryant v. Rich*, 106 Mass. 180, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant, as a common carrier, was held liable for the injury. In *Oroaker v. Chicago and Northwestern*

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Ry. Co., 36 Wis. 637 ; s. c. , 17 Am. Rep. 504, where the conductor of a railroad train kissed a female passenger against her will, the court, in an elaborate opinion, held the railroad company liable for compensatory damages. It is there said : ' We can not think there is a question of the respondent's right to recover against the appellant for a tort which was a breach of the contract of carriage.' In *Sherley v. Billings*, 8 Bush, 147, where a passenger on defendant's boat was assaulted and injured by an officer on the boat, the defendant was held liable. See also, *McKinley v. Chicago and Northwestern R. R. Co.* 44 Iowa, 314 ; s. c. , 24 Am. Rep. 748 ; and *N. O., St. L. and C. R. R. Co. v. Burke*, 58 Miss. 200. Many other authorities holding the same doctrine might be cited, but we do not regard it necessary. It is true there are authorities holding the opposite view, but we do not think they declare the reason or logic of the law, and we are not prepared to follow them.

"The appellant was a common carrier of passengers. As such it was not an insurer against any possible injury that a passenger might receive while on the train, but the company was bound to furnish a safe track, cars and machinery of the most approved quality, and place the trains in the hands of skillful engineers and competent managers—the agents and servants were bound to be qualified and competent for their several employments. Again the law required appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow passengers who might be on the train, and if the agents of appellant in charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So too the contract which existed between appellant as a common carrier and appellee as a passenger, was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts toward passengers while in charge of the train. Any other rule might place the travelling public at the mercy of any reckless employee a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger."

On the other hand, in *Marion v. Chicago, R. I. and P. R. Co.*, Iowa Supreme Court, October 4, 1883, it was held that the defendant was not liable for the act of a brakeman in putting a trespasser off a freight train in motion, without direction from the conductor who alone was authorized by the defendant to order such ejection. The court below charged: "Even though the instruction and rules of the company placed the matter of the removal of trespassers, or non-paying passengers, from the trains under the immediate charge and discretion of the conductor, and it was the duty of the brakeman to put off such persons only by the direction of the conductor as his superior, the defendant is not relieved from liability simply because, in this instance, the brakeman acted without orders or direction from the conductor. But if the brakeman, not as a part of his duty as an employee of the defendant, but for the gratification of his own feelings, willfully or maliciously assaulted the plaintiff, and in this assault the plaintiff fell to the ground, then the defendant is not liable. The point you are to observe is this: That as the defendant owed the plaintiff no duty as a common carrier, therefore unless the brakeman, as an employee of the company engaged in operating the train, acted for the purpose of putting him off, and freeing the train from him as a trespasser, the defendant is not liable for this act." On review the court said: "The rule is familiar that an employer is liable for the torts of an employee only where they are committed in the course of his employment. The difficulty has been to determine what acts should be deemed within the course of his employment. If in this case the conductor had forced the plaintiff from the train while in motion, and while crossing a bridge, the act very clearly would under the evidence be deemed to be in the course of his employment, and that too even if it were shown that he had been expressly instructed to eject no person from the train while in motion, and especially when crossing a place as dangerous as a bridge. In one sense the specific act would not be in the course of his employment, but his general employment to remove trespassers from the train would be sufficient to render the company liable. But it appears to us that the act of an employee of a railroad company, in removing a trespasser from a train, cannot be considered the act of the company, unless he was employed generally to

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remove trespassers, or specifically to remove the particular trespasser. The court below appears to have thought otherwise. The instruction given proceeds upon the theory that where a person is employed to do one thing, and he volunteers to do another, his act shall nevertheless be deemed to be within the scope of his employment, if his purpose was to serve his employer. But in our opinion the purpose of the employee is not, in a case like the one at bar, material. The court, we think, was misled by a distinction which has been drawn by courts in a different class of cases. Where the question is as to whether the employer is liable for a willful injury done by an employee, it is sometimes important to inquire whether the employee's purpose was to serve his employer by the willful act. *Illinois Cent. R. Co. v. Downey*, 18 Ill. 239; *Wright v. Wilcox*, 19 Wend. 243 (22 Am. Dec. 507); *Monroe v. Sanborne*, 2 Mich. 519; *Croft v. Allison*, 4 B. & Ald. 590; *Johnson v. Barber*, 5 Gilm. 425; *Foster v. Essex Bank*, 17 Mass. 479. The rule is that an employer is not liable for a willful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the willful act. Where the employee is not acting within the course of his employment, the employer is not liable, even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring the act within the course of his employment. Where a female servant, having authority to light fires in a house, but not to clean the chimneys, lighted a fire for the sole purpose of cleaning a chimney, it was held that her employer was not liable for an injury caused by her negligence in lighting the fire. *Mackenzie v. McLeod*, 10 Bing. 265. See also, *Twanda Coal Co. v. Heeman*, 86 Penn. St. 418. In our opinion the court erred in the instruction given, and in refusing the instruction asked by the defendant." *Nobleville, etc., Co. v. Gause*, 76 Ind. 142; s. O., 43 Am. Rep. 221, and note, 225.

In *Wabash, St. Louis & P. Ry Co. v. Rector*, 104 Ill. 801, the court said: "It appears plaintiff delayed attempting to enter the cars until after the train was in motion, although plenty of time was allowed for that purpose, had he desired to do so. By the time he did attempt to get aboard, the train had acquired considerable speed. As the end of the rear car came opposite plaintiff, he caught hold of the rear guard rail and stepped with one or both feet on the bottom step, and swung around to the rear of the car. The evidence tends to show a collision occurred between plaintiff and the conductor, who was attempting to board the train at the same time and at the same platform. In an effort to recover himself plaintiff swung back, and with his right hand took hold on the other guard rail, and it was while he was in that position, it is alleged, he was wantonly and willfully assaulted by the conductor." The court said: "It is an admitted fact plaintiff, although holding a ticket entitling him to passage, did not attempt to get aboard defendant's cars until the same began to move away from the station. After the cars were in motion, and had acquired considerable speed, plaintiff undertook to get on the cars by catching hold of the railing of the rear car, and while he was holding on to it with both hands as well as he could, he was injured by a violent assault made by the conductor, and was otherwise injured. It is at this point in the case the first serious error occurs in the action of the trial court in giving instructions for plaintiff. The first of the series is as follows: 'If the jury believe, from the evidence, that the plaintiff, under all the circumstances, in attempting to board defendant's train, if he so attempted, acted as a reasonably prudent person would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by the plaintiff resulting from the willful or wantonly malicious conduct of the servant of the defendant acting in the line of his duties, the defendant would be liable for such injuries.' Under some circumstances the principle of this instruction might be applicable, but it was calculated to mislead the jury under the admitted facts of this case. While this charge must be condemned in its application to the facts of this case, it must not be understood that any carelessness or dereliction of negligence on the part of a passenger would excuse a wanton and malicious attack on him by the conductor or other servant of the company. No matter how negligent a passenger may be for his safety, that would not warrant the infliction of a willful injury by a railroad employee."

Curry v. Fowler.

CURRY V. FOWLER.

(87 N. Y. 88.)

Partnership — what is not.

An advance of money to purchase and erect buildings, for interest and one-half the profits of sale, which the receivers guarantee at a certain amount, the advances and profits being secured by mortgage, does not constitute the party advancing a partner as to third persons.

ACTION for work and materials. The opinion states the facts. The defendant had judgment below.

Abner C. Thomas, for appellant.

Aaron Pennington Whitehead, for respondent.

MILLER, J. The plaintiff's claim to recover of the defendant Fowler depends upon the question, whether by the terms of the contract between Fowler and the McCormacks, Fowler had such an interest in the profits of the business of that firm as to render him liable jointly with them as a partner, for the amount of the plaintiff's demand.

By the agreement, which recited that the McCormacks were the owners of certain real estate therein mentioned, and were about to erect fifteen houses on the same, and in consideration of a share in the profits of the purchase and building of the said houses, Fowler agreed to advance the sum of \$50,000 toward the purchase and erection of the buildings, from time to time, as required, and the McCormacks were to share the profits with Fowler, and he was to be allowed interest on the moneys advanced and one-half of the profits of the houses when sold, which were to be equal to at least the sum of \$12,500. The amount of the advances was to be secured by a bond and a mortgage on the premises. Fowler was also to take new second mortgages for his loan and the profits under the agreement, whenever the McCormacks should be ready to obtain a first loan on said premises, which said mortgages were to be paid off when the houses covered thereby were sold. All the mortgages called for by this agreement were executed and delivered, aggregating \$62,500. Fowler having been advised that the taking of \$12,500

was usurious, all of the mortgages were cancelled and new mortgages given, amounting to only \$50,000. In *Richardson v. Hughitt*, 76 N. Y. 55; s. c., 32 Am. Rep. 267, it was held by this court that a person who has no interest in the business of a firm or in the capital invested, save that he is to receive a share of the profits as a compensation for services, or for money loaned for the benefit of the business, is not a partner and cannot be held liable as such by a creditor of the firm. The case cited is very similar in its leading aspects to the one at bar. In both cases money was advanced or loaned and security taken upon property; in the case cited upon personal property, and in the case at bar by a mortgage upon real estate. A percentage was to be paid in each case as interest, and in one of them one-fourth of the profits and in the other one-half thereof. The money was to be repaid to the party advancing the same, after a sale had been made of the property taken as security therefor. In the case cited the borrower did not personally agree to pay the loan except from the proceeds realized upon the sale of the property, while here he was obligated to do so in any contingency, and in this respect the circumstances in the case at bar tend more strongly to establish that there was no copartnership. A distinction is recognized in the case cited between a provision made as to the profits as a means of compensation for the use of the money advanced or loaned, and the receipt of the profits as a partner only; and the question is considered and discussed whether the money was advanced by the defendant as a member of the firm, or a loan made where the profits were to be received as a measure of compensation for such loan. In the case at bar it is not claimed that the defendant took any part, or had any thing to do with the construction of the buildings, or any connection with the contract, except by the advancing of the money, and as that was all he did, there is no ground for claiming, that by reason of making a loan which related to a building contract, he became a partner with the builders. The case cited is directly in point, and we are unable to discover any such difference from the case at bar as would authorize us to disregard the principle which it establishes. We have examined the various grounds upon which it is claimed to be distinguished by the appellant's counsel, and are brought to the conclusion that none of them are well founded. The points urged in this connection, so far as material, are covered by what has already been remarked as to the similarity of the leading features of the contract here to

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that in the case cited, and the legal effect of its provisions as to the money advanced and the payment of the same, and the profits to be derived therefrom. In neither of the cases can it be urged on any reasonable ground that there was an attempt to evade responsibility as a partner while reaping the advantages of the copartnership, and the case cited is, we think decisive, and the question presented must be considered as *res adjudicata*.

The judgment should be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., not voting.

NOLAN V. BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY.

(87 N. Y. 68.)

Negligence — contributory — riding on car-platform.

It is not necessarily negligent for a passenger to ride on the front platform of a street car. (*See note, p. 847.*)

ACTION for personal injury by negligence. The opinion states the facts. The plaintiff had judgment below

Charles B. Alexander, for appellant.

Frederic A. Ward, for respondent.

FINCH, J. This is one of those cases where the real quarrel is with the verdict of the jury, and the struggle on appeal is to avoid their solution of the question of fact. Whether that can be successfully done, within the limits of our power of review, is the question to be considered.

The plaintiff, at a late hour of the evening, took passage upon one of the street cars of the defendant company. There were but two or three other passengers and abundance of room and vacant seats inside. Nevertheless, the plaintiff, who was smoking, rode upon the front platform. He did so, he says, because it was the custom of the line to permit no smoking elsewhere, but to permit it there. While thus riding on the platform, he claims to have been thrown

off and injured by the negligence of the driver. His presence upon this platform, it is now insisted, was *per se* negligence, and bars his right of recovery. No decisive authority for this proposition has been cited to us. The printed rules of the company in connection with the General Railroad Act are first relied upon. (Laws of 1850, p. 211, § 46.) That act relieves the companies from liability where they post in their cars a warning against riding on the platform, and furnish a seat to the passenger within the car. Such a notice was claimed to have been given in this case, and the rule posted in the car was produced. That rule is in these words, viz.: "Passengers are forbidden to get on or off the car while in motion; or on or off the front platform; or on or off the side, except nearest the sidewalk." This rule does not at all forbid riding on the front platform. It is the getting on or off from that part of the car which is forbidden; evidently because a mis-step or an accidental fall would there be more dangerous than at the rear platform. But once on, not a word of warning is uttered against remaining and riding there. The efficacy of the statute failing, it is next argued that the authorities determine the front platform to be a place of danger, and the passenger, who without necessity rides there, takes upon himself the risk of accident. We do not so understand the decisions to which our attention is called. In *Phillips v. Rensselaer & S. R. R. Co.*, 49 N. Y. 177, the passenger undertook to get upon the cars while in motion, and was plainly guilty of contributory negligence. In *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135, the passenger was riding on the steps of a car, a position palpably more dangerous than riding on the platform. In *Ward v. Central Park, etc., R. R. Co.*, 11 Abb. (N. S.) 411 it appeared that the track was in bad condition from accumulations of snow and ice, of which the passenger was fully cognizant, and which the court say was suggestive of the "extreme probability" of a jar or jolt. In *Solomon v. Central Park, etc., R. R. Co.*, 1 Sweeney, 298, the boy was sitting on the step of the front platform, and was thrown off by a jolt. In all these cases there was some element warranting an inference of negligence beyond and outside of riding on the front platform. These authorities do not establish the doctrine asserted. On the contrary, the rule is settled, that independent of the mandate of the statute, which we have seen has no application here, it is not, even in the case of steam cars, negligent *per se* for a passenger to stand on the front platform of a moving car. *Willis v. Long Island R. R. Co.*, 34

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N. Y. 670; *Hudencamp v. Second Ave. R. R. Co.*, 1 Sweeney, 490; *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596. The question is one of fact for the jury, taking into view all the circumstances of the case. *Morrison v. Erie R. Co.*, 56 N. Y. 307; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Westchester & Phila. R. R. Co. v. McElwre*, 17 P. F. Smith, 311; *Meesel v. L. & B. R. R. Co.*, 8 Allen, 234; Whart. on Neg., § 366. That must necessarily be the rule in a case like the present. Not only was no notice, such as required by the statute, given to the passenger, forbidding him from riding on the front platform, but he was expressly permitted so to do by the act of the conductor in taking his fare while in that position, and the proven custom of the company to require passengers who were smoking to ride on that platform. If there has been any doubt about this question, it may now be deemed settled that where the notice required by the statute is not given, it is not *per se* negligence for a passenger to ride on the front platform of a street car.

[Minor questions omitted.]

We think the judgment must be affirmed, with costs.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—See *Thirteenth and Fifteenth St. Pass. Ry. Co. v. Boudrou*, 98 Penn. St. 475; a. c., 37 Am. Rep. 707, and note, 710.

In *Downey v. Hendrie*, 46 Mich. 493, it was held contributory negligence for a passenger of ordinary common sense to sit on the driving-bar of a street car even at the driver's invitation if there is room for him inside the car. The court said: "The point is understood as being, that granting the driving bar to have been, as the plaintiff knew, a dangerous seat, and also admitting that the fact of his occupying it was a proximate contributory cause of his injury, yet as his sitting there was on the driver's invitation it ought not to be reckoned as contributory negligence. There is no doubt that it has been laid down as a rule that an assignment of the passenger by the carrier to a position of danger may in case of injury estop the carrier from setting up the occupation of that position as contributory negligence. But the rule is plainly not one of universal application.

"Regard must be had to the passenger's capacity to look out for himself; to the opportunity there may be to get a safer position; to the distinctness, certainty and extent or degree of the peril, and so on.

"Take the case of a child, and the case of a man every way qualified to take care of himself; the case where the position given seems tolerably safe and no better one is perceived; and the case where it is manifestly one full of danger and a safe one is known which is equally accessible. It would be very unreasonable to apply the rule equally to all. May the ordinary passenger, with his eyes open and with abundant accommodations before him which are safe, accept an invitation from the carrier to ride on the cow-catcher and then if injury arise from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might, would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being and in substance to stultify himself in order to cast a liability on another.

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"Judges cannot denude themselves of the knowledge of the incidents of railway traveling which is common to us all." *Siner v. Great W. Ry. Co.*, L. R., 4 Ex. 123; *Dublin, Wicklow & Wexford Ry. Co. v. Slattery*, 3 App. Cas. 1155; 24 Eng. 713; *Lake S. & M. S. R. R. Co. v. Miller*, 25 Mich. 274. And in the example put the negligence would be so obvious and its commission so palpably and certainly inexcusable that a court would not be justified in treating the question of the passenger's responsibility as an open one. A direct charge would be called for.

"Other cases may be supposed where from the nature of the circumstances a blind acceptance of the carrier's suggestion, however hazardous, would not so clearly reveal the passenger's disregard of that primary duty which rests on every one to exert his own will and judgment to guard against needless perils, as to justify the judge in taking the matter from the jury. No doubt the riding on a cow-catcher would to ordinary apprehension, if not in fact, be an exposure to consequences more serious than any at all probable to arise from riding on the driver's bar of a street car in the way in which the plaintiff rode on this occasion; but the unfitness of the situation and the fact that it involves great risk of some injury more or less severe and is therefore one of extreme danger, is just as conspicuous in the one case as in the other.

In *Camden and Atlantic R. Co. v. Hoosey*, Pennsylvania Supreme Court, January 27, 1882, a passenger upon a railroad train, unable in consequence of the crowded condition of the cars to obtain a seat, although there was standing room inside, placed himself on or near the edge of the outside platform, and rode there, with his back against the end car window, holding on by an iron rail affixed to the car. While in this position a jolt occurred, by which he was thrown upon the track and injured. Suit having been brought by him against the company to recover damages for the injury, *held*, that he should have been nonsuited. The court said: "He was not only in the position of known danger, but was there voluntarily and in disregard of the rules of the company. * * * Having shown by his own testimony that at the critical juncture he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to prove that he was there from necessity and not from choice. * * * The dangerous position on the platform in which the plaintiff voluntarily placed himself while the cars were in rapid motion, was undoubtedly the immediate cause of his being jolted off. If there had been any testimony from which it could have been reasonably inferred that he was there from necessity and not from choice, it would have been a question for the jury, but in the absence of such evidence, it was error to refuse the point, and leave it to the jury to determine whether he was or was not guilty of contributory negligence. Of all the passengers on a long train of twenty overcrowded cars, the plaintiff was the only one who appears to have been injured. If he had submitted, as many others did, to the inconvenience of standing inside the cars, or if he had been guilty of no greater imprudence than passing from car to car while the train was in rapid motion, it is not at all probable he would have been injured. His much to be regretted misfortune was the result of his own carelessness. This was clearly proved by uncontroverted testimony, from which no other conclusion could reasonably be drawn." *MERCUR, GORDON, and TRUNKY, JJ.*, dissent.

In *People's Passenger Ry. Co. v. Green*, 56 Md. 84, an action against a street passenger railway company, the evidence showed that the plaintiff, while riding in a car of the defendant, got up and gave his seat to an elderly lady. The car being crowded he was obliged to pass out on the front platform. While standing there the car ran off the track, and at the request of the driver, the plaintiff, with others on the platform, got off and assisted in getting the car again on the track. When this was done the passengers got on the front platform again by stepping over an inclosure three feet high surrounding the same; and while the plaintiff was in the act of getting on the platform in the same manner, the driver without a signal or warning, started the horses. By the sudden jerk in starting, the plaintiff was thrown down on the side of the car and was dragged some distance and his foot crushed by the wheel. The accident occurred in the day time, and there was proof tending to show that the driver might have seen the plaintiff in the act of boarding the car. Proof was also offered to show there was a notice on the inside of the car requiring passengers to enter and leave the car by the rear platform. *Held*, that conceding there was negligence on the part of the plaintiff in attempting to enter the car by

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the front platform, the question was whether the driver of the defendant's car, by the exercise of proper care and prudence might have seen the position of the plaintiff, and thereby have avoided the injury, that taking into consideration that the plaintiff had paid his fare, and that owing to the crowded condition of the car he was obliged to stand on the front platform, that he had gotten off at the request of the driver to help in getting the car again on the track, and the other facts in the case—there was an obligation on the part of the driver to see that the plaintiff and others had an opportunity to get on the car again before he started the horses; and if he saw, or by the exercise of proper care might have seen the position of the plaintiff and thereby have avoided the injury, the defendant was liable, and that there was evidence *legally sufficient* to submit this question to the jury. See *Lewis' case*, 38 Md. 588; s. c., 17 Am. Rep. 521; *Tuff v. Warman*, 94 Eng. C. L. 583; *Butterfield v. Forrester*, 11 East, 60; *Dowell v. Gen. St. Nav. Co.*, 85 Eng. C. L. 195.

GRAHAM V. FIREMAN'S INSURANCE COMPANY.

(87 N. Y. 69.)

Insurance — misrepresentation — materiality.

Where a fire insurance policy is conditioned to be void "in case of any misrepresentation whatever," any misrepresentation, whether material or not, will avoid it.

ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

James C. Cloyd, for appellant.

N. B. Hoxie, for respondent.

MILLER, J. The first condition in each of the policies of insurance upon which this action was brought provides that if any application, etc., is referred to in the policy, it "shall be considered a part of this contract, and a warranty by the assured." It is then stated that if any false representation by the assured, of the condition, etc., of the property shall be made, or any omission to make known any fact material to the risk," etc., "or any overvaluation, or any misrepresentation whatever, either in the written application or otherwise," and after enumerating other things, concludes that "then and in every such case this policy shall be void." The evident meaning and purpose of the concluding clause is, that if any of the conditions named are violated, the policy shall be avoided. The judge upon the trial held that the provision touching any misrepresentation was a warranty which prevented a recovery, and di-

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rected a verdict in favor of the defendant, and the plaintiff's counsel excepted to the ruling. It is claimed by the appellant's counsel that this was error, for the reason: First, that the statement insisted upon as a ground for the forfeiture, was a misrepresentation, and if untrue, must be shown to be material, to avoid the policy. Second, whether material or not was a question for the jury. We think that the position taken cannot be upheld, and that the true interpretation of the policy is, that it is void in case of any misrepresentation whatever in reference to the particulars which are enumerated. The concluding clause specifies quite distinctly what should be the result of a violation of any of the conditions named, and giving full force and effect to the phraseology employed, it cannot be questioned that any misrepresentation whatever avoided the policy. While it may well be that a misrepresentation of a matter which does not affect the risk, and is not material in some cases, as is claimed, will not avoid the policy, and whether it is material is a question for the jury, such rule has, we think, no application whereby the terms of the policy misrepresentations are converted into warranties by a stipulation that an untrue answer will avoid the policy. (May on Insurance, 104, § 195.) If it is stipulated that if there is any misrepresentation whatever the contract should be void, it is of no importance whether it is a warranty or a representation. The materiality is contracted for and under the rule as to warranties is not a subject of consideration. A condition in a policy, that if a building stands on leased ground, that fact must be especially represented to the company and expressed in the policy, is ordinarily considered as a warranty that the building did not stand on leased ground, and the truth of that warranty becomes a condition precedent to any liability of the insurer. *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 439. So also, a provision that if the insured suffer any judgment or decree as a lien to pass against him, without communicating it to the insurer, it is held to be an express warranty. *Egan v. M. Ins. Co.*, 5 Den. 326.

In *Anderson v. Fitzgerald*, 4 H. of L. Cas. 484, false answers were made to questions contained in the proposal for life insurance, and it was agreed that the particulars mentioned in the proposal should constitute the basis of the contract. Several things were also mentioned that the insured warranted, but nothing was said about false answers. The policy also contained a provision that if any thing warranted should not be true, or if any circumstance

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material to the insurance shall not be truly stated, or shall have been misrepresented or concealed, or any false statement made to the company in or about the obtaining or effecting the insurance, it should be void. It was held that this prohibited every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute whether the particular matter to which it related was material or not, leaving for the company to determine for itself what matters it deemed material, and what not, and that it was error to leave to the jury the question whether the representation was material or false, the question being as to the truth, and not the materiality of the representation. The cases cited establish the principle that where the provisions of the contract explicitly declare that it shall be void in case of misrepresentation, and certain conditions which are enumerated are not performed, the truth and not the materiality of the misrepresentation is the real question.

We have been referred to some authorities by the counsel for the appellant which are claimed to hold adversely to the doctrine laid down in the cases already cited, but we think they are not analogous. In *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 568, the application for insurance contained a valuation of the lands and buildings which was excessive, and which contained a covenant that the valuation, description and survey is true and correct and that they are submitted as his warranty and the basis of the desired insurance." The policy in referring to the application stated that the insurance was "on the following property as described in application." It was held that this only adopted that portion of the application describing the property, and that there was no warranty as to the value. The rule is also laid down that when parts of the application are not adopted and made the basis of the contract, so as to constitute warranties, they are to be treated as representations, not prejudicing the rights of the insured, unless they are material to the risk, are untrue and were not made in good faith. This rule must be considered in reference to the facts presented in the case cited and cannot be regarded as adverse to the rule laid down in the cases to which we have referred.

The case cited from the Massachusetts Reports, *Vose v. E. L. & H. Ins. Co.*, 6 Cush. 47, does not present a state of facts so precisely similar as renders it directly in point, but even if it were otherwise, it cannot control the adjudications in this State. Al-

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though the misrepresentation as to the ownership of the property was oral, it is nevertheless within the rule that such a representation as to a present fact as to the title, situation, use or condition of the property material to the risk, may be shown to avoid the contract. Wood on Ins. 415, § 212; *Alston v. Mechanics' Ins. Co.*, 4 Hill, 329, reversing 1 id. 510.

This limitation however relates to a misrepresentation where there is no warranty. But where there is a warranty in the policy covering "any misrepresentation whatever, either in the written application or otherwise," the materiality of the representation is not usually controlling.

[Omitting other points.]

Judgment affirmed.

All concur.

MOORE V. GADSDEN.

(87 N. Y. 84.)

Negligence — icy sidewalk.

The owner of a city lot is not liable for an injury sustained by one passing over his sidewalk and slipping on ice formed thereon by water dripping from the dwelling, the steps, and the grounds, and the melting of snow; there being no defect in the premises, no interference by the defendant with the sidewalk, and no duty imposed on him by statute or ordinance to take care of the sidewalk.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Edwin M. Felt, for appellant.

Benj. H. Baylis, for respondent.

DANFORTH, J. The defendant was the owner of certain premises situated on Hamilton street and Gates avenue, in the city of Brooklyn. The complaint alleged that he negligently and in violation of ordinances and statutes allowed snow and ice to accumulate on the sidewalk in front of those premises; that plaintiff while

* See *Wenslick v. McCotter*, post

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passing over it on the 25th of January, 1879, slipped, fell and was thereby injured. These things were denied by the answer. The fall of the plaintiff and her injury was clearly established, and evidence given to show that the condition of the sidewalk was as described in the complaint. No proof was given of any law or ordinance relating to sidewalks or the care thereof. At the close of the plaintiff's case, the defendant moved to dismiss the complaint upon the ground that there was no evidence tending to show negligence on his part, and specifically that it did not appear that the ice upon which the plaintiff slipped and fell came upon the sidewalk from the defendant's premises and his want of care. The court denied the motion, and in submitting the case to the jury said: "To entitle the plaintiff to recover, she must satisfy you that her injury was caused by some negligence of the defendant, and without negligence on her part contributing to the accident;" and limited this general rule by declaring that he would not be liable "for damages caused by falling upon the sidewalk by reason of snow or ice which has formed from the fall of snow or water" thereon; adding, one "injured by that cause must look to the city or to the officers of the city," and if nothing else had appeared, he should dismiss the complaint. But he submitted the case to the jury as one in which they might find that the ice in question "was the result of water which flowed from the melting snow or from rain running from the premises of the defendant upon the sidewalk in front of his house." Exceptions to the refusal of the court to dismiss the complaint and to this portion of the charge present the only material questions upon this appeal. The evidence discloses no interference by the defendant with the sidewalk, nor does it appear that the natural surface of his yard had been changed, or that the steps of his house had been constructed in any other than a proper and usual manner. There is no suggestion that the snow had been removed from either and placed upon the sidewalk; but the respondent's position is, "that there was no barrier in front of the yard or steps to prevent the melted snow from running upon the sidewalk, and both the steps and yard sloped toward the sidewalk and the sidewalk sloped toward the gutter." Snow fell upon the 15th of January; if it melted, it was from natural causes, and obeying the law of gravitation found its way upon the sidewalk. If there was no liability — and such is conceded by both parties to be the law of this case — for ice formed of snow

which had fallen directly upon the walk and there melted, it is difficult to see upon what principle it can attach in the case supposed. The general doctrine is, that the public are entitled to the street or highway in the condition in which they placed it, and whoever renders the use hazardous, by placing any thing upon it, is guilty of a nuisance. *Congreve v. Smith*, 18 N. Y. 79. The plaintiff's case is not within it. The sidewalk was constructed to receive the drip from the steps and yard, and so graded as to discharge itself into the gutter. If by reason of obstruction, which it was the duty of the city or its officers to remove, it failed to do its office, the defendant cannot be made liable.

The cases cited by the respondent do not seem to the purpose. In *Walsh v. Mead*, 8 Hun, 387, a passer-by was injured by snow falling from a steep roof, and recovered upon the ground that it was left without a snow-guard, and so improperly constructed. Such a roof was held to be a nuisance. In *Todd v. City of Troy*, 61 N. Y. 506, the ice causing the injury was formed from water gathered from the roof and poured through a conductor pipe upon the sidewalk. The city was held liable, and there was no suggestion that the fact referred to afforded ground for its relief. Applying it to the case before us, the municipal authorities of Brooklyn would be liable under the circumstances here disclosed, as well as under those adverted to in the charge of the trial court. *Kirby v. Boylston Market Association*, 14 Gray, 249. But in the present case we find no evidence which seems to distinguish it from one where rain falling at once on the walk there congeals, or snow hardens. In either instance, its presence is the result of natural causes, unaffected by artificial arrangement.

We think therefore the learned court erred in submitting the case to the jury as one in which, under the law of the case as declared upon the trial, the plaintiff was entitled to recover.

The judgment should therefore be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

All concur.

Cosgrove v. New York Central and Hudson River Railroad Company.

COSGROVE v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY.

(87 N. Y. 83.)

Negligence — concurring causes.

If a traveller, driving on a highway and approaching a railroad crossing, is personally free from negligence, and the railway company neglects to give warning of the approach of a train, the traveller is not debarred from recovering for injury by collision by the fact that his horse, frightened by the engine, suddenly starts forward, and draws the driver into the danger.

ACTION for death by negligence. The opinion states the case. The defendant had judgment below.

Homer A. Nelson, for appellant.

Samuel Hand, for respondent.

ANDREWS, C. J. The negligence imputed to the defendant was the omission to ring the bell or sound the whistle, as required by statute, Laws 1854, chap. 282, § 7. The evidence on this point was conflicting, and presented a question for the jury. The non-suit sought to be sustained on the ground that the accident was caused by the horse becoming unmanageable and getting beyond the control of the driver, and rushing in front of the engine, and that the omission of the statutory signals did not cause, or contribute to, the casualty.

[Omitting detail of facts.]

There can be no controversy as to the proposition that to entitle the plaintiff to recover, it must appear, or there must be evidence from which a jury could infer that the intestate's death was caused by the neglect of the defendant to ring the bell or blow the whistle; or that such negligence, without any concurrent negligence of the intestate, contributed to cause his death. If the accident resulted from a distinct and independent cause, with which the neglect of the statutory duty had no connection, plainly there can be no recovery; and it is equally clear that if the deceased heard the noise of the locomotive, or was in any way apprised of its approach, in time to have enabled him, by the exercise of reasonable prudence, to have avoided the danger, and he chose to trust to the ability of the driver to manage the horse and avoid a colli-

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sion, the defendant is not responsible for the casualty, notwithstanding its omission to ring the bell or sound the whistle. But on the other hand, if he did not hear the locomotive, or know of its approach, the mere fact that the horse, on seeing the engine, suddenly started forward, and getting beyond control, drew the wagon on to the track in front of it, would not exempt the defendant from responsibility. If the horse had not started, doubtless no injury would have occurred. But horses are liable to be frightened by the passing of trains, and if a traveller driving upon a highway is himself free from fault, a railroad company, guilty of negligence in not giving the signals, cannot escape responsibility because the horse, frightened by the sudden approach of the engine, blindly rushes before it, and exposes the traveller to injury. In the case supposed, the neglect to give the signals is the legal cause of the accident, and not the conduct of the brute. The cause of the restiveness of the horse when coming down the hill is not shown. It may be conjectured that he heard the noise of the locomotive; but it certainly is not a legal inference that the deceased or the driver heard it, because the horse did. If the deceased heard it before reaching the end of the wall, he may have been negligent in remaining in the wagon; but it was for the jury to draw the inference from the evidence. When did the deceased first discover the danger; and did he do, or omit to do, any thing after he knew that the engine was approaching, which reasonable prudence required; and did the omission to give the statutory signals subject him to the peril which otherwise he would have avoided?

We think these questions should have been referred to the jury, and that the nonsuit was improperly granted. This leads to a reversal of the judgment and a new trial.

Judgment reversed.

All concur, except RAPALLO, J., absent.

Argall v. Jacobs.

ARGALL V. JACOBS.

(57 N. Y. 110.)

Bankruptcy — composition — fraudulent debt.

A debt fraudulently contracted is not discharged by composition in bankruptcy.*

ACTION upon promissory notes. The opinion states the case. The plaintiff had judgment below.

Samuel Hand, for appellants.

D. C. Briggs, for respondent.

EARL, J. This action was brought upon two promissory notes given by the defendants to the plaintiff for goods sold. They in their answers admit the making and delivery of the notes, and set up, as an affirmative defense, a composition and discharge thereby in bankruptcy subsequent to the date of the notes.

Upon the trial, the plaintiff, to avoid the effect of the bankruptcy discharge, gave evidence, under objection and exception, tending to show that his debt was created by the fraud of the bankrupts, and the trial judge charged the jury that if they found that the debt was so created the discharge was no bar to the action, and to this defendants' counsel excepted.

The Bankrupt Act of 1867 (U. S. Rev. Stats., § 5117), provides that "no debt created by the fraud of the bankrupt * * * shall be discharged by proceedings in bankruptcy;" and the act of Congress, chapter 390 of the acts of 1874, introduced the system of discharges by composition between the bankrupt and his creditors. It was strenuously argued before us, on the part of the defendants, that a composition under the act of 1874 was binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, were shown on the statement of the debtor produced at the meeting of creditors at which the resolution favoring the composition was passed, whether their respective debts were created by fraud or not; and that the limitation above cited

* To same effect, *Scott v. Olmstead*, 53 Vt. 211; *Mudge v. Wilmot*, 124 Mass. 493.

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from the act of 1867 did not apply in such a case. The plaintiff however contends that no debt is barred by the bankruptcy composition which would not have been barred under the Bankrupt Act of 1867; and so it was held in *Wilmot v. Mudge*, 103 U. S. 217. Upon this branch of the case therefore nothing more needs be said.

[Minor point omitted.]

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur.

WENZLICK v. MCCOTTER.

(87 N. Y. 122.)

Nuisance — icy sidewalk — water conductor — continuance of.

A pipe discharging water from the roof of a city building upon the sidewalk, and there forming ice, but not itself extending upon the sidewalk, and properly constructed, is not a nuisance *per se*.

Where one buys premises having upon them one such discharge-pipe for the accommodation of his and adjoining premises, but changes the flow and does not use the pipe for his own premises, but the pipe continues to discharge the water from the adjoining premises, he is not liable to one, who passing along the sidewalk, falls upon ice formed by such discharge, and is injured.*

ACTION of damage for personal injury by nuisance or negligence. The head-note and opinion show the facts. The plaintiff had judgment below.

John A. Taylor, for appellant.

A. H. Dailey, for respondent.

DANFORTH, J. *First*, it is unnecessary to consider whether at the close of the plaintiff's case she had established a cause of action. The defendant did not then retire from the contest; and if the necessary facts were after that established, it is sufficient. *Murray v. Judah*, 6 Cow. 484; *Jackson v. Leggett*, 7 Wend. 377.

Second, it is well to observe that the proof failed to sustain the

* See *Moore v. Gadsden*, ante, 352.

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avermment of the complaint as regards the position and extent of the pipe upon the sidewalk. It did not reach the street, nor did it abridge the area of the walk. Nor does the decision below or the contention of the respondent rest upon that averment. Both stand upon the fact that it was the medium through which water was discharged thereon. I do not, however, find the law to be that a conductor pipe, designed to convey water from the roof to the ground, when constructed with due care and proper precaution, is in itself unlawful, so that it can be deemed a nuisance, even if its mouth is toward the walk, and it discharge upon it. Of course, if it was a wrong or a trespass, the recovery here might be justified. But the water itself is no injury; nor was the owner of the property forbidden by any ordinance to relieve his roof in that manner. It is common in cities to direct rain or melting snow from the roof to the gutter and thence to the leader, and so on to the sidewalk or street. Unless prohibited by positive regulation it is not an offense. If when gathered the water is poured upon the traveller, a different question would arise. But as the care of streets and sidewalks is intrusted to the municipality, if they do not object to the discharge, I do not see how an individual can. Once upon the walk, and there frozen and permitted to remain, it may subject the municipality to an action for an omission of duty. Upon this ground the city of Troy was held liable to one injured by stepping upon ice so formed. *Todd v. City of Troy*, 61 N. Y. 506. While under like circumstances, it was held in *Kirby v. Boylston Market Association*, 14 Gray, 249, that an action would not lie against the property-owner, and that the remedy for damages so incurred was exclusively against the city. Nor can the plaintiff's case be made out upon the ground that the defendant caused the obstruction. As he neither erected the pipe nor used it, at no time intermeddling with it in any way, or being benefitted by it, the most that can be said is that he did not tear it up or remove it. If it is a nuisance, it was placed there before he acquired title to his house, and his position is not unlike that of the owner of land upon which a third party should wrongfully enter and erect a nuisance. In such a case the owner would not be liable either for the erection of the nuisance or its continuance, until he was requested to abate it. If he used or repaired it, the case would be different, for thus he would become an active participant in the wrong. It is sometimes said to be enough to charge a defendant, that having acquired the title

to land after the nuisance was erected, he has continued it. 2 Greenl. Ev., § 472. But this must be taken to mean more than an omission to abate or remove it—something amounting to actual use. As if the defendant simply suffer a dam erected upon his land by a former owner to remain, without being used by him, it is no continuance of the nuisance, unless he be first requested to remove it. *Pierson v. Glean*, 2 Green, 36; *Morris Canal, etc., Co. v. Ryerson*, 27 N. J. 457, 469. To the same effect is *Berwick v. Cunden* (Cro. Eliz. 520), where the complaint was that the defendant *custodivit and manutenuit quandam molem* in a brook, “by reason whereof the brook surrounded his land.” The court say its meaning is that he kept the bank as he found it, “and that is not any offense done by him, for he did not do any thing; and if it were a nuisance before his time, it is not any offense in him to keep it.” And *Moore v. Dame Browne*, 3 Dyer, 319, where the defendant’s husband wrongfully inserted a pipe into the plaintiff’s conduit, thereby drawing water at his pleasure to serve his house. After his death the wife was found guilty of continuing the nuisance erected by him, because by turning the cock and using the water, she assented to, and thereby adopted the wrongful act of the husband; later cases are to the same effect. *Morris Canal, etc., Co. v. Ryerson*, *supra*. Nor do those cited by the respondent establish any different doctrine. In *Brown v. Cay. & Sus. R. R. Co.*, 12 N. Y. 486, the obstruction—a bridge—was not made by the defendant, but it had repaired the bridge by the insertion of new timber, placed a new rail upon the track resting thereon, and used it. And so in *Wasmer v. D., L. & W. R. R. Co.*, 80 N. Y. 212; s. c., 36 Am. Rep. 608, there was use of the nuisance by the defendant. That case stands upon the general doctrine that he who knowingly adopts and uses a nuisance is just as responsible as he who created it. In *Irvine v. Wood*, 51 N. Y. 224; s. c. 10 Am. Rep. 603; and *Clifford v. Dam*, 81 N. Y. 52, the coal-hole which caused the injury was used by the defendants as appurtenant to their premises. In *Walsh v. Mead*, 8 Hun, 387, the roof of the defendant’s house was not furnished with a snow-guard, proved to be an essential appliance on such a roof for the protection of persons travelling on the walks below; and the plaintiff, while there, was injured by snow falling from the roof. The case is clearly distinguishable from this in the fact that the injury came from accumulations on the defendant’s own house, and fell because he had improperly constructed it. In

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the case before us, the defendant by merely suffering the pipe to remain, doing nothing to it, in no way using it, cannot be said to have continued the nuisance. If I am right in this conclusion, it follows that the case stated in the complaint and adopted as the ground of judgment was not established.

Other objections are made to the plaintiff's recovery, but as for the reasons above stated the judgment must be reversed, I forbear to speak upon them, as the evidence upon which they are thought to stand may be varied if a new trial should be had.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur.

KING'S COUNTY FIRE INSURANCE COMPANY v. STEVENS.

(87 N. Y. 237.)

Deed — boundary — highway.

A deed of land beginning at a point on the side of a road, and running thence by courses and distances to the road, and thence along the road to the place of beginning, does not convey to the center of the road. *

ACTION to restrain the tearing down of a fence. The opinion states the case. The defendant had judgment below.

N. Cothren, for appellant.

Jesse Johnson, for respondent.

ANDREWS, C. J. The title of the plaintiff to the southerly half of what was formerly the Wallabout bridge road, on which the plaintiff's premises abutted, depends upon the construction of the deed from Garrett Nostrand to Edward Sanford, dated January 20, 1835. Sanford is the common source of the title to the premises of both parties. The defendant's lot also abutted on the Wallabout road, until its discontinuance, long after the conveyance of the respective lots, by Sanford. If Sanford acquired title to the south-

* See *contra*, *Low v. Tibbells* (73 Me. 92), 39 Am. Rep. 303; and note, 305.

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erly half of the road, under his conveyance from Nostrand, the plaintiff, as his grantee, acquired his title to the part in front of its premises. Upon the assumption that the plaintiff acquired title to that part of the road, the right of the plaintiff to relief in this action, by injunction, would depend upon questions, not now necessary to be considered. If however the title to the southerly half of the road did not vest in Sanford, under his deed from Nostrand, then the action cannot be maintained. The fence torn down by the defendant was built by the plaintiff across the southerly half of the road-bed of the Wallabout road, which before that time was uninclosed, and over which the defendant was accustomed to pass in going to and from her premises. The obstruction was removed immediately after it was erected, and there was no such prior possession by the plaintiff as would, in the absence of legal title, constitute the defendant a trespasser, in entering upon the land and removing the fence. We come then to the question, whether Sanford acquired title to the road-bed under his deed from Nostrand. That deed purports to convey about seventy-four acres of land lying south of the Wallabout bridge road, described as, "Beginning at a point on the southerly side of the Wallabout bridge road, adjoining the land now or lately belonging to John Skillman," and after running certain courses and distances, the line ran along the land of one Jocubus Lott "north, forty-eight degrees and nine minutes west, five hundred and ninety-four feet to the Wallabout bridge road," and from thence "along said road, twelve hundred and twenty feet to the place of beginning."

There is but little diversity in respect to the general principles governing the contruction of grants of land on a highway, but there is much contrariety of decision in the several States, in respect to their application, in particular cases, and in the construction of particular language, as bearing upon the point whether the highway is by the descriptive language of the conveyance included in or excluded from the grant. It is generally conceded that a grantor of land abutting on a highway may reserve the highway from his grant. But the presumption in every case is, that the grantor did not intend to retain the highway, and such reservation will not be adjudged, except when it clearly appears, from the language of the conveyance, that such reservation was intended. But what language will be sufficient to exhibit such intent, is the point of difficulty, upon which courts have differed. It was settled in this State,

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in *Child v. Starr*, 4 Hill, 369, that a boundary in a deed, "along the shore" of a fresh-water river, carried the grantee only to low-water mark, and that the bed of the river did not pass under the conveyance. So a boundary by the *bank* of a creek has been held to confine the grantee to the margin of the stream. *Halsey v. McCormick*, 13 N. Y. 296. In *The Seneca Nation, etc., v. Knight*, 23 N. Y. 498, the boundary was described as "beginning at a post on the *north* bank" of the Cattaraugus creek, and thence ran, by various courses and distances, to a post on the *north* bank of the creek, "thence down the same, and along the several meanders thereof, to the place of beginning," and it was held that the grant included the bed of the stream to the center. The court approved the remark of Chancellor WALWORTH, in *Child v. Starr*, that monuments in such cases are only referred to, as giving the directions of the lines to the river or stream, and not as restricting the boundary on the river. The court also remarked, that in a case of boundary on a river monuments are never located, in fact or in description, in the channel of a river, and that monuments were necessary, in order to mark the places of intersection with the stream. There is a close analogy between conveyances bounded by fresh-water streams, and by highways, in respect to the point of construction of descriptive words. In the case before us, the starting point of the description is on the southerly side of the Wallabout bridge road, and the exact point of beginning is fixed by the reference to the lands of Skillman. The other lines are described by courses and distances, and the third course gives the length of that line in feet to the road, which we think fairly imports that the measurement is to the side of the road, and the fourth course is along the road, etc., to the place of beginning. We think the road-bed was excluded by the terms of the description within the cases of *Jackson v. Hathaway*, 15 Johns. 447 (8 Am. Dec. 263); *English v. Brennan*, 60 N. Y. 609; *White's Bank of Buffalo v. Nichols*, 64 id. 65. In *Jackson v. Hathaway* the description was "beginning at a certain stake by the side of the road called the old Claverack road, etc., from which stake running east, twenty degrees south, two chains to another stake; thence south, twenty-two degrees west, seventeen chains, sixty-four links; and thence" by specified courses and distances "to the first-mentioned bounds, making twelve acres, two roods and ten perches of land." It was held that the highway was not included. In *English v. Brennan*, the court reached the same conclusion, where the descrip-

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tion was : "Beginning at the south-westerly corner of Flushing and Clermont avenues, running thence westerly along Flushing avenue twenty-five feet, thence southerly at right angles to Flushing avenue, seventy-nine feet nine inches to a point distant forty feet seven and a half inches westerly from the westerly side of Clermont avenue, thence easterly on a line at right angles to Clermont avenue, forty feet seven and a half inches, thence northerly, etc., to the point of beginning. In *White's Bank, etc., v. Nichols*, the reasoning of ALLEN, J., is much in point. He says : "The grant under which the defendant claims title describes the granted premises as commencing at the intersection of the exterior lines of two streets, of which Garden street is one, and so as necessarily to exclude the soil of the street. The point thus established is as controlling as any monument would have been, and must control the other parts of the description ; all the lines of the granted premises must conform to the starting point thus designated."

The cases of *Sibley v. Holden*, 10 Pick. 249 (20 Am. Dec. 521) ; *Smith v. Slocomb*, 9 Gray, 36 ; and *Cottle v. Young*, 59 Me. 105, are also in point. In *Sibley v. Holden*, the description was : "Beginning at a stake and stones on the southerly side of a town road," etc., thence by courses and distances "to said road, thence by said road easterly to the place of beginning," and it was held that the road was excluded. In *Smith v. Slocomb*, where the description was very similar to that in *Sibley v. Holden*, SHAW, C. J., said : "But when it starts at the side of the road, and comes back to the road, and thence on the line of the road to the point of beginning, the conclusion is inevitable, that the road is excluded." The words to and along the road, in the description now in question, if not controlled by the starting point, would by well-settled construction carry the boundary to the center ; but it is to be observed that these words are not inconsistent with confining the boundary to the side of the road. It was held in *Dunham v. Williams*, 37 N. Y. 251, that a deed bounded on a highway is satisfied by title extending to the side of the road, when the title to the road-bed was not in the grantor, and according to the principle of that case, the absence of such title, where the description runs to and along a highway, would not constitute a breach of the covenant of seizin. In this case no reason appears why Nostrand should desire to retain title to the land in the Wallabout road. The Wallabout Bridge Road Company was a corporation created by special charter, by chapter 86 of the Laws of 1805,

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with authority to take land for its road, by private grant, or compulsorily, on paying the damages assessed, in which case the act declares the company, and their successors and assigns forever, shall have and hold "the lands and tenements occupied by the said road." The side of the road may have been made the boundary of the land conveyed, upon the mistaken supposition that the company had acquired, by the proceedings for condemnation, the absolute title to the land taken, or some other reason may have existed for restricting the grant. But we have no guide in ascertaining the intention of the parties to the conveyance, outside of the language of the deed, and upon this language, as interpreted by the courts of this State in analogous cases, we think the southerly side, and not the center of the Wallabout road, is the boundary.

These views lead to an affirmance of the judgment:

Judgment affirmed.

All concur.

TRUSTEES OF COLUMBIA COLLEGE v. THACHER.

(87 N. Y. 311.)

Covenant— not to permit trades on granted premises— change in character of neighborhood.

Owners of adjacent premises in the city of New York mutually covenanted that only dwelling-houses should be erected thereon, and not to carry on or suffer any kind of manufactory, trade, or business thereon. Subsequently the value of the premises for any but trade purposes was greatly impaired by the advance of business, and the erection and operation of an elevated railway in the street. *Held*, that the covenant ran with the land, but owing to the change in circumstances and the defeat of the scheme of the original covenanters it would not be specifically enforced against a subsequent purchaser.

ACTION to enforce covenant. The head-note and opinion sufficiently show the facts. The plaintiff had judgment below.

A. J. Dittenhoefer, for appellant.

S. P. Nash, for respondent.

DANFORTH, J. The validity and binding obligation of the cove-

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nant cannot be questioned by the defendant Thacher. *Trustees of Columbia College v. Lynch*, 70 N. Y. 440. Moreover it appears that he bought with notice, not only of the agreement, but of this action. He therefore could not take the property without performing the obligation attached to it, and must be deemed to have taken it at his own peril, to the extent of such judgment as might be rendered in the action. It is claimed in his behalf that the business charged in the complaint to have been carried on does not come within the prohibition of the covenant. This question was not raised upon the former trial, and of course there is nothing in our decision 70 N. Y., *supra*, to prevent its litigation upon the trial then ordered, and now under review. The words are very plain; they include "any kind of manufactory, trade or business whatsoever," on the premises. The complaint shows their occupation in part by "a real estate and insurance broker or agent," and in part by "sign and fresco painters," while the finding of the trial judge—and this is somewhat more important—shows that "the business of a tailor and milliner, of a newspaper agent, express carriers, a tobacconist, as well as that of an insurance agent," were carried on by permission of the defendant at the time of the trial. It would be a useless waste of time to argue that these vocations—for employment or profit, whether described in the complaint, or found by the court—have no relation to the exclusive use to which the premises were set apart. In such a suit as this, the relief which the court can give must depend upon the condition of things at the time of the trial. We have no doubt that the conclusion of the trial judge was right upon the point presented, and agree with him, that these several trades or occupations were violations, not only of the spirit, but also of the letter of the covenant.

Now having before us a covenant binding the defendant, and his breach of it, if there is nothing more, the usual result must follow, viz.: an injunction to keep within the terms of the agreement; for the case would come under the rule laid down in *Tipping v. Eckersley*, 2 K. & J. 264, 270, thus: "If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of a breach of covenant affords sufficient ground for the court to interfere by injunction." Indeed, this has in substance been recognized in the decision before made by us. 70 N. Y. *supra*. It was then however suggested that another trial might disclose objections not before us, and it is now claimed by the appellant,

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that there has been such an entire change in the character of the neighborhood of the premises, as to defeat the object and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privilege of conforming his property to that character, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. The agreement before us recites, that the object which the parties to the covenant had in view was "to provide for the better improvement of the lands, and to secure their permanent value." It certainly is not the doctrine of courts of equity, to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where under those circumstances the relief he seeks would be inequitable. *Peters v. Delaplaine*, 49 N. Y. 362; *Margraf v. Muir*, 57 id. 155; *Mathews v. Terwilliger*, 3 Barb. 51; *Radcliffe v. Warrington*, 12 Ves. 331. If for any reason therefore not referable to the defendant an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere, or if in fact the condition of the property by which the premises are surrounded has been so altered "that the terms and restrictions" of the covenant are no longer applicable to the existing state of things. 1 Story Eq. Jur. (10th ed.), § 750. And so though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff. *Willard v. Tayloe*, 8 Wall. 557; *Thomson v. Harcourt*, case 66, p. 415, vol. 2, Brown's Parl. Rep.; *Davis v. Hone*, 2 Sch. & Lef. 350; *Baily v. De Crespigny*, L. R., 4 Q. B. 180; *Clarke v. Rochester, Lockport & Niagara Falls Railroad Co.*, 18 Barb. 350.

There is no doubt difficulty in embodying these principles in any general rule applicable alike to all cases, but in any given instance a court can more easily determine whether it should interfere, or leave the plaintiff to his remedy at law. In *Clarke v. Rochester, Lockport & Niagara Falls Railroad Co.*, *supra*, there was a duty imposed by statute upon the defendant to construct a farm crossing, and the plaintiff sued in equity for its performance. He succeeded at Special Term, but the General Term dismissed his complaint so

far as it demanded equitable relief, yet allowed it to stand for the assessment of damages. This result was reached, because the expense to the defendant in constructing the crossing "would much exceed the value of it to the plaintiff," and so in the opinion of the court there was not only an absence of proof that the enforcement of the performance of the duty would be equitable, but it was affirmatively proved that it would be inequitable. There the plaintiff's case was within the statute, Laws of 1850, ch. 140, §§ 50, 49, 44, requiring railroad corporations to erect farm crossings for the use of the proprietors of land adjoining such railroad — and so the court held — but also that a refusal to perform did not, as of course, entitle the plaintiff to the interposition of a court of equity. In *Willard v. Tayloe, supra*, the court refers to cases where a claim had, in the discretion of the court, been denied, because of some irregularity or unfairness in the terms of the contract, by reason of which injustice would have followed a specific performance, and to others which show that the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work the same result, or even hardship, to either of the parties. In that case, although relief was granted, it was upon reasons which do not concern the one in hand, and it was also said that it was "not sufficient to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect," but "it must also appear that the specific performance will work no hardship or injustice." In *Thomson v. Harcourt, supra*, the irregularity of the bargain related exclusively to the time when performance was demanded. In *Baily v. De Crespigny, supra*, we find a case whose facts come near to those before us. The action was at law for damages for breach of an agreement that neither the defendant nor his assigns would permit any building to be placed upon a certain "paddock" fronting the demised premises. The plea alleged the purchase and a compulsory taking of it by a railroad company for the purposes of their incorporation, and the erection upon it, by them, of the structure complained of as a breach of covenant. Upon demurrer judgment was given for the defendant, upon the ground that the transfer to the company was not by voluntary act of the prior owner, but by compulsion of law, and the court was of opinion that he was discharged from his covenant, on the principle expressed in the maxim, "*lex non cogit ad impossibilia*."

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In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled. The general current of business affairs has reached and covered the entire premises fronting on Sixth avenue, both above and below the lot in question. If this was all however the plaintiffs would be justified in their claim, for it is apparent from the agreement that such encroachment was anticipated, and that the parties to it intended to secure the property in question from the disturbance which business would necessarily produce. But the trial court has found that since the action was begun, an elevated railway has been built in the Sixth avenue. It runs past the premises, and a station has been established in front of them, at the intersection of Fiftieth street. He finds that "the railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation." The evidence sustains the finding. The premises may still be used for dwellings but the occupants are not likely to be those whose convenience and wishes were to be promoted by the covenant, persons of less pecuniary ability, and willing to sacrifice some degree of comfort for economy, transient tenants of still another class, whose presence would be more offensive to quiet and orderly people who might reside in the neighborhood. Not only large depreciation in rents when occupied, but also frequent vacancies have followed the construction of the road. Its trains, propelled by steam, run at intervals of a few minutes, until midnight. The station covers from fifteen to twenty feet of the street opposite the defendant's premises. Half the width of the sidewalk is occupied by its elevated platform. From it, persons waiting for the trains, or there for other purposes, can look directly into the windows. Noise from its trains can be heard from one avenue to the other.

It is obvious, without further detail, that the construction of this

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road and its management have rendered privacy and quiet in the adjacent buildings impossible, and so affected the premises of the defendant, and all those originally owned by him, who, with the plaintiff, entered into the covenant, that neither their better improvement nor permanent value can be promoted by enforcing its observance. Nor are the causes of this depreciation transient. The platform of the railroad station, which renders inspection of the interior of the house easy to all observers; the stairs, which render the road accessible, must remain so long as the road is operated, and the noise and smoke are now, at least, an apparent necessity, consequent upon its operation. It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the legislature, and by reason of it, there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood, and property values. It has made the defendant's property unsuitable for the use to which, by the covenant of his grantor, it was appropriated, and if in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity. The land in question furnishes an ill seat for dwelling-houses, and it cannot be supposed that the parties to the covenant would now select it for a residence, or expect others to prefer it for that purpose. And although the land has not itself been taken as in *Baily v. De Crespigny*, *supra*, for actual occupation by the railroad, the railroad has incumbered the walks and streets about it, and taken away those advantages of situation which induced its owners to dedicate it to dwellings instead of stores, and to retirement rather than to the bustle of business. Submission to this is necessary, because it is authorized by the legislature, and so the defendant is made incapable of carrying out, if he should desire it, the wishes of those by whose agreement he would otherwise be bound.

There is, I think, no merit in the respondent's suggestion that the change in the character of the neighborhood is insufficient so long as it does not extend to all the property affected by the agreement. If this assumption is well founded—if the influence of the road is felt only by the portion of land owned by the defendant,

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it is still apparent that the original design of the parties has been broken up by acts for which neither the defendant nor his grantors are responsible, that the object of the covenant has been, so far as the defendant is concerned, defeated, and that to enforce it would work oppression, and not equity.

To avoid this result the judgment appealed from should be reversed, and the complaint dismissed, but as this result is made necessary by reason of events occurring since the commencement of the action, it should be without costs.

Judgment reversed, and complaint dismissed.

Judgment reversed.

All concur.

PAINE V. UPTON.

(87 N. Y. 337.)

Mistake — deed — "more or less."

Where by mutual mistake 206 acres were conveyed as "about 222 acres, be the same more or less," the price being fixed at so much an acre, and a mortgage given for part, the grantee was held entitled to a corresponding abatement therefrom.*

ACTION to correct a mortgage. The opinion states the facts. The defendant had judgment on the trial, which was reversed by the General Term.

D. C. Hyde, for appellant.

Theodore Bacon, for respondent.

ANDREWS, C. J. We are not left in this case to ascertain the facts from the evidence, or to determine whether the evidence supports the facts found by the trial judge.

The evidence is not contained in the record, and the case comes here on the findings alone. The facts as found are therefore conclusively settled, and the only question is, whether upon those facts the plaintiff is entitled to relief. The defendants, other than Mary A. Upton and Alexander Pomeroy, were owners as tenants in

* See *Baltimore Permanent Building and Land Society v. Smith* (54 Md. 187), 39 Am. Rep. 374.

common of a farm in Monroe county, formerly owned by their father, James Upton, commonly known as the homestead farm. James Upton died in December, 1868. The defendant Mary Upton is his widow, and the defendant Pomeroy is one of the executors of his will. A few weeks prior to February 28, 1872, the defendants offered the farm for sale. This led to a negotiation between the plaintiff and defendants for the purchase and sale of the farm. The plaintiff went upon and examined the farm, and its external boundaries were correctly pointed out to him. At the outset of the negotiation the plaintiff asked the defendants how much land there was in the farm, and at what price they would sell it. They informed him that the farm contained two hundred and twenty acres and upward, and that they had asked for the same, \$150 an acre, but would sell it for \$33,000. At the same time they exhibited to the plaintiff a printed description, describing the farm by metes and bounds in three parcels; one parcel was described as containing one hundred and ninety-one and fifty-one-hundredths acres, more or less, another as containing thirty acres, more or less, and the third as containing one acre, making in the aggregate two hundred and twenty-two and fifty-one-hundredths acres. The plaintiff declined to purchase the farm at the price fixed by the defendants, but made a counter-offer of \$30,000, which the defendants declined. But on the 28th of February, 1872, the negotiation was concluded by an agreement for the sale of the farm to the plaintiff, for the sum of \$31,687, and written articles were entered into between the parties, in which the farm was described in general terms as the homestead farm of the late James Upton, on the lots named, "containing about two hundred and twenty-two acres of land, be the same more or less." The articles provided, that the purchaser should assume a mortgage on the premises, and pay the balance of the purchase-money in installments, and secure the part which should remain unpaid at the time of the execution of the deed by his bond and a mortgage on the premises. The deed was to be executed April 2, 1872, and was executed and delivered at that date, and at the same time a mortgage was executed by the plaintiff, as provided in the articles. The deed described the farm, in three parcels, as in the printed description exhibited to the plaintiff.

The plaintiff on the purchase of the farm took possession, and has ever since occupied it. About nine months after the deed was

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given, his suspicion was excited of the accuracy of the representation of quantity, made by the defendants, and upon investigation it was ascertained that the farm, instead of containing two hundred and twenty acres and upward, contains only two hundred and six and thirty-five one-hundredths acres, there being a deficiency, in reference to the quantity which the defendants represented it to contain, of more than thirteen acres, the value of which, at the average price per acre paid for the farm, upon the assumption that it contained two hundred and twenty acres, would be \$1,953.93.

The trial judge found that all the parties believed, during the negotiation for the sale of the farm, and at the time of executing the contract and deed, and until about nine months after the making of the deed, that the farm did in fact contain two hundred and twenty acres of land, and upward, and that such negotiation and agreement were had and executed on both sides, upon the basis of such common belief and understanding, and that all the parties were mutually mistaken in the belief that the farm contained at least two hundred and twenty acres. The judge further found that James Upton, prior to 1865, owned and occupied as part of his homestead farm, the first parcel described in said deed, and also another parcel adjoining it, of about twenty acres, making together one hundred and ninety-one and one-half acres. In that year he sold the small parcel. After his death the unsold part was mortgaged as containing one hundred and ninety-one and one-half acres, and the mistake was perpetuated in the subsequent descriptions of the farm.

The precise question presented is, whether upon the facts found, the plaintiff is entitled to an abatement from the bond and mortgage given for the purchase-money, proportionate to the deficiency of acreage in the farm.

It is to be observed that the facts affirmatively show a mutual mistake of the parties, in respect to the quantity of land, which commenced with the commencement of the negotiation for the sale of the farm, and pervaded the whole dealing from that time, until the transaction was consummated, by the giving of the deed and the execution of the mortgage. This mistake moreover was as to an essential and material element of the contract. In the absence of any finding of special facts and circumstances, the natural presumption is that in a sale of agricultural land the element of quantity enters into the transaction, and affects the consideration

agreed to be paid. But in this case it is plain, that the representation of quantity was deemed material by the parties. The sale was perhaps not technically a sale by the acre. But the starting point of the negotiation was an inquiry by the purchaser, as to the quantity of land in the farm, and the gross sum originally asked was fixed by the sellers, by reckoning the land at \$150 an acre, not counting any surplus there might be over two hundred and twenty acres. The price finally agreed upon was also fixed upon the supposition that the farm contained at least two hundred and twenty acres. This is a necessary inference from the finding, that the parties acted upon the assumption that the farm contained that number of acres, and that the contract was made and executed upon this basis. It is also very material, that the misconception under which the plaintiff labored in respect to the number of acres, was induced by the untrue, although not fraudulent, representation of the defendants.

Leaving out of view for the present the words "more or less" in the contract, and looking at the contract as still executory, and as if these words had been omitted, the facts found would present a clear case for the interposition of equity. The case of *Hill v. Buckley*, 17 Ves. 394 is a leading case on the subject, and has been repeatedly referred to with approval. It was a bill filed by a vendee, against a vendor, for specific performance of a contract for the sale of land for a gross sum, with an abatement for deficiency in the number of acres, stated in the contract. The relief was granted upon equitable terms, and in the course of his opinion the master of rolls (Sir Wm. Grant) said: "When a misrepresentation is made as to quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation." And he adds "that is the rule generally; as though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price, regard was had on both sides to the quantity, which both suppose the estate to consist of." But the right of a purchaser, under such a contract, to have a corresponding abatement of the purchase-money, exists as well after the execution of the deed, as before, where the mistake was not known, when the deed was executed. This relief has been frequently granted. *Shovel v. Bogan*, 2 Eq. Cas. Abr. 688; *Quesnel v. Woodlief*, 2 Hen. & Mumf. 173, note;

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Couse v. Boyles, 3 Gr. Ch. 212; *Darling v. Osborne*, 51 Vt. 148. The court in granting such relief does not make a new contract for the parties, but simply conforms the nominal agreement to the real one. The vendor cannot in justice be permitted to defeat the vendee's right to a reformation of the contract, or to an abatement from the purchase-money by the plea, that if he had known of the deficiency, he might nevertheless have exacted the same price. When the quantity is an essential element of the contract, the presumption is, as stated by Sir Wm. GRANT, that the price was fixed by both parties with reference to it, and in this case it is a reasonable presumption, that if the true quantity of land had been known, the purchase-price would have been reduced by an amount corresponding with the deficiency in the land.

The contract in this case is distinguishable from the one in *Hill v. Buckley*, in the circumstance that the words more or less, annexed to the statement of quantity, and it is a pertinent inquiry, whether if the contract was still executory the introduction of these words would defeat the right of the plaintiff to belief, notwithstanding the conceded misrepresentation of the defendants, and the mutual mistake of the parties as to the quantity of land. We are relieved from the necessity of examining the authorities elsewhere, with a view of determining whether under such circumstances the presence of these words, in an executory contract for the sale of land, is a bar to equitable relief, by the decision of this court in *Belknap v. Sealey*, 14 N. Y. 143. It was there held that the introduction of the words more or less, following the enumeration of the number of acres, was no obstacle to relief in equity upon the ground of mistake. The authorities in this State were carefully reviewed in the able opinion of COMSTOCK, J., and it was satisfactorily shown that the cases supposed to have a bearing adverse to this view were of two classes, first, cases where the question was one of construction purely, in a court of law, and not one of mistake in a court of equity, and second, cases where relief was denied on the ground that it appeared from the words more or less, and the extrinsic circumstances, that the risk of the quantity was one of the elements of the contract. The court said, that those words, in a contract or conveyance of land, do not import a special engagement that the purchaser takes the risk of the quantity, and that while their presence may render it more difficult to prove such a mistake as will justify the interference of equity, they are

not equivalent to a stipulation that the mistake, when ascertained, shall not be ground of relief. The conclusion in *Belknap v. Sealey*, is founded, we think, upon the most obvious equity. It is not a satisfactory answer to the claim for relief, against a mistake in the quantity of land contracted to be sold, embraced within given boundaries, to say that the statement of the number of acres is mere matter of description. It is true that such a statement, following a description by boundaries, does not amount to a covenant that the land contains that quantity, but it is quite another question whether equity will not relieve a purchaser when both parties supposed the statement to be true, and the bargain was made upon that belief—and it turns out that the quantity is less—and the mistake materially affected the consideration. It was said in *Belknap v. Sealey*, that the primary purpose of these words is to indicate that all the land within the boundaries specified is included in the contract or deed, and is intended to pass to the purchaser. They are also intended to cover small discrepancies between the actual quantity and that stated in the contract or deed, and no inference of mistake would arise from a small discrepancy merely. But where the difference is material and the mistake is confessed, or satisfactorily proved, there would seem to be no violation of principle in granting relief. It must be conceded upon the authority of *Belknap v. Sealey*, that if the contract for the sale of the farm in question was still executory, the plaintiff upon the facts found would be entitled to equitable relief.

The point remaining to be decided is, whether the acceptance of the deed, and the giving of the bond and mortgage, barred the antecedent right of the plaintiff to have the mistake corrected. It cannot be denied that this claim finds some support in the observations of judges, but no case has been called to our attention, nor have we found any, where the point has been so adjudged. The suggestion in some of the cases, that by the acceptance of a deed containing the words, more or less, or, by estimation, in connection with the statement of quantity, the purchaser is concluded from obtaining relief on the ground of mistake, appears to have been founded upon an inference from the language used in 1 Sugden on Vendors, 526. The distinguished author of that work, referring to the general subject, says: “Where the contract rests *in fieri*, the general opinion has been that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abate-

ment, although the agreement contained the words more or less, or by estimation." It will be perceived that the writer does not say, that after a conveyance, such relief cannot be granted, but the language has been sometimes regarded as implying this. It seems to us however that this is a misconception of the author's meaning. In the paragraph preceding the one quoted, the author had stated, that "where the lands in a conveyance are mentioned to contain so many acres by estimation, or the words more or less are added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency." This language clearly implies, that in case of a considerable and material discrepancy in quantity, relief could be had after a conveyance. The paragraph just quoted is followed by a reference to a case referred to in the *Anonymous* case, 2 Freeman, 107, in these words: "A case is said to have been decided, where a man conveyed his land by the quantity of one hundred acres were it more or less, and it was not above sixty acres; but the purchaser had no relief, because it was his own *laches*." This language is immediately followed by the language first quoted, upon which the defendants rely to establish the proposition, that relief against mistake as to quantity, when the words more or less, or equivalent words are used, can only be granted before a conveyance, and when the contract of sale is *in fieri*. Mr. Sugden, as will be noticed, uses very guarded language in referring to the case cited in Freeman, speaking of it as a case said to have been decided, and Judge STORY, in *Stebbins v. Eddy*, 4 Mason, 418, referring to the same case, remarks, that Mr. Sugden thinks the case open to much observation. The case is doubtless in conflict with many authorities in holding that the words more or less covered so large a deficiency. The statement by Mr. Sugden in the subsequent paragraph, that the general opinion was that relief could be granted where the contract was *in fieri*, was not, we think, intended to imply that in his opinion relief could only be granted before a conveyance; but was designed, by bringing into view the principle upon which courts proceed in respect to contracts to convey, to discredit the doctrine of the unreported case immediately before referred to, in which the conveyance had been executed.

Considering the question on principle, we can perceive no solid ground for affirming the jurisdiction of a court of equity in the one

case and denying it in the other. The general jurisdiction of a court of equity to set aside, or to reform written instruments, in cases of fraud or mistake, is not limited to executory contracts. Such a limitation, as was said by ROBERTSON, C. J., in *Harrison v. Talbot*, 2 Dana, 258, would be irreconcilable with an obvious and pervading principle of justice. It is doubtless true that the annulling or reforming of executed transactions is an exercise of supreme judicial power. The power should be exercised with great caution, and when invoked on the ground of mistake, a plain case should be made, before it is exerted. But these are considerations which address themselves to the chancellor, in the exercise of the jurisdiction; they ought not to prevent the interference of equity when the proper occasion for interference arises. The granting or refusing of equitable relief on the ground of mistake may depend, to some extent, on the fact whether the contract is executory or executed. The court might very well refuse the specific performance of a contract for the sale of land, in respect to which a mistake is alleged, and leave the party to his remedy at law, when it would not interfere, if the contract had been executed. But it cannot, we think, be maintained upon principle, that where a mistake is admitted or proved, the fact that the title has passed and the purchase-money has been paid or secured, precludes the court, on the mistake being discovered, from granting relief. The consummation of the transaction in ignorance of the mistake, without *laches* on the part of the party injured, gives to the other party no immunity from making recompense, nor does it deprive the court of the power to remedy the injustice. In this case no *laches* can be imputed to the plaintiff. He could not ascertain the mistake, from seeing the external boundaries of the farm, and he had a right to rely upon the representation of the defendants. The cases of *Quessel v. Woodlief*, 2 Hen. & Mumf. 173, and *Darling v. Osborne*, 51 Vt. 148, are direct authorities in support of the conclusion we have reached, and it is also supported by the case in this court of *Wilson v. Randall*, 67 N. Y. 338.

The order of the General Term should be affirmed, and the plaintiff should have judgment absolute on the stipulation.

Order affirmed and judgment accordingly.

Order affirmed.

All concur.

O'CONNELL V. PEOPLE.

(87 N. Y. 377.)

Criminal law — evidence — burden of proof of insanity.

On a criminal trial the burden of proof of insanity is upon the prosecution, but the presumption that every man is sane is sufficient to sustain that burden until repelled

So where the court charged, "he is presumed to be a sane man until he convinces you by evidence that he is insane," *held*, correct.*

CONVICTION of assault with intent to kill. The opinion states the case.

D. Cady Herrick, district-attorney, for defendant in error.

J. H. Clute, for plaintiff in error.

DANFORTH, J. The appellant was convicted of an assault with intent to kill. The conviction was affirmed by the General Term of the Supreme Court, and upon appeal from that decision two points are made in his behalf. *First*, that the court erred in charging the jury. In support of this proposition it is assumed by his counsel that the judge charged "that the defense of insanity is an affirmative defense" and the prisoner bound to satisfy the jury by proof that he was insane. *Second*, that the court erred in refusing to charge that the defendant was entitled to the benefit of any reasonable doubt arising on the evidence as to his sanity or insanity. We think neither is well taken. The questions upon the trial were, *first*, were the acts charged committed by the prisoner, and *second*, at the time of their commission was he in such condition of mind as to be responsible for them. If answered in the affirmative the acts constituted a crime and the conviction was proper. As to each therefore the burden was upon the prosecutor, for upon the existence of both the guilt of the prisoner depended.

This result follows the general rule of evidence which requires him who asserts a fact to prove it. That the first proposition was established is not denied. The legal presumption that every man is sane was sufficient to sustain the other until repelled, and the charge of the judge, criticized in the first point made by the appellant,

* See *State v. Redemer* (71 Mo. 173), 36 Am. Rep. 462, and note, 467.

goes no further. If the prisoner gave no evidence the fact stood ; if he gave evidence tending to overthrow it, the prosecutor might produce answering testimony, but in any event he must satisfy the jury, upon the whole evidence, that the prisoner was mentally responsible ; for the affirmative of the issue tendered by the indictment remained with the prosecutor to the end of the trial. Without going to other authorities these observations are warranted by *Brotherton v. People*, 75 N. Y. 159, where the general rule above stated was applied to questions similar to those before us.

It was not violated by the trial court. After referring to acts constituting the offense charged and the rules of law applicable thereto, the learned judge called attention to the fact alleged in behalf of the prisoner, that he was an insane man at the time they were committed and so not responsible therefor, and directed them "to determine from the evidence whether or no such is the fact." "He is presumed," the court said, "to be a sane man until he convinced you by evidence that he is insane," defined insanity in a manner not objected to, and said if such was the prisoner's condition "he was relieved from responsibility, otherwise he was responsible for that which he does," and in conclusion said, "if you have a reasonable doubt, from the evidence, that the prisoner is guilty of this crime, then you should give him the benefit of that doubt." These words related to, and covered the whole issue tendered by the indictment. It is quite impossible that the jury should have misapprehended them. The prosecutor had conducted the trial upon the theory that the burden was upon him of maintaining, as a part of that issue, the sanity of the prisoner; this further appears from his request; when anticipating that the jury might fail to find the greater offense, the district attorney asked the court to charge "that if the jury find the wounds were inflicted by the prisoner, and that he was sane, etc., they could convict of an offense lesser in degree," and the court complied. Here again, as well as in the preceding part of the charge, the sanity of the prisoner is made a necessary element in the definition of the crime.

It therefore was not necessary to comply with the request of the prisoner's counsel. The substance of the request was embraced in the charge made, and the court could not be required either to repeat it or answer again to different portions as analyzed by counsel.

We think the charge will not bear the construction on which the

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first point of the appellant rests, and as the trial was conducted without error, the conviction should be affirmed.

Judgment affirmed.

All concur, EARL, J., concurring in result.

ADAMS V. CONOVER.

(87 N. Y. 422.)

Basement — conveyance by implication — right of flowing by dam.

The defendant deeded to plaintiff, with a covenant of quiet enjoyment, a tract of land, including a mill, with a dam and pond for supplying the water, "with the appurtenances." When the deed was given there were flush-boards on the top of the dam, the use of which caused the pond to overflow the land of F., who owned the adjoining premises above on the stream. This overflow was not known to the plaintiff at the time of purchase. F. recovered against the plaintiff for overflowing his land, and the plaintiff was compelled to reduce the height of his dam. *Held*, that an action would lie for breach of the covenant.*

ACTION for breach of covenants of warranty and quiet enjoyment. The head-note and opinion show the facts. The plaintiff had judgment below.

W. H. Adams, for appellant.

John Gillette, Jr., for respondent.

FINCH, J. The principal attack upon this judgment is based upon a doctrine which we have recently approved. *Green v. Collins*, 86 N. Y. 246; s. c., 40 Am. Rep. 531. We held in that case that a conveyance of land, though transferring whatever is properly and lawfully appurtenant to the subject of the grant, does not convey an easement which has no lawful or valid existence as such, although it may seem or appear, as a matter of fact, to be attached to the land. And this upon the obvious ground that mere general words or presumptions arising from the character and uses of the property conveyed cannot justly be construed to pass a right or easement in another's land, which the grantor cannot effectually grant, and

* For criticisms upon this case and *Green v. Collins*, *supra*, see 95 Alb. Law Jour. 273; see also notes, 40 Am. Rep. 381, 587.

which his deed, on its face, does not necessarily purport an intention to convey. We further held that the ordinary covenant of warranty is co-extensive only with the grant, and does not reach or operate upon any thing beyond it, and what the deed does not purport to convey the covenant cannot be said to warrant. The application of this doctrine to the present case is accomplished by limiting the entire controversy to the flowing of Felt's land, and treating that as an easement in the property of a stranger from which alone the plaintiff had been evicted. If there was nothing else of the case the doctrine referred to would be decisive. The grant might be held not to pass the pretended easement, and therefore its loss would break no covenant of quiet enjoyment. But that is not this case. It has in it another and very important element, the possible effect of which in cases of the conveyance of a mill property we broadly intimated in *Green v. Collins*, might lead to a different result. The conveyance here was of that character. It transferred within its metes and bounds a dam and water-power essential to the full enjoyment and operation of a plaster-mill. It conveyed the dam as it then stood, at its existing and apparent height, representing sufficient head and adequate power to drive the mill successfully and properly. The power thus created and stored was the essential and material element of value in the mill property which was the subject of the conveyance, and was alone measured and secured by the dam at its existing height. It stood with its slash-boards in plain sight of the purchaser, and formed largely the ground and reason of his purchase. He had a right to assume that it stood lawfully at its existing height, that his deed would pass it at the same height, and allow him rightfully to maintain it unchanged, and so preserve to him the water-power which was the important and essential element of his purchase. By every rule of fair construction the deed of the grantor purported to convey the dam as it existed, as it stood, and the water-power it thus indicated and measured, if not in terms, at least as an incident of the grant.

From the thing thus conveyed, itself covered by the deed and passing under it, the grantee was evicted by a paramount title. It caused an overflow of Felt's land. As to the latter, it became a nuisance, which he might lawfully abate. *Brown v. Bowen*, 30 N. Y. 519; *Thompson v. Allen*, 7 Lans. 459. If in pursuance of that right he had come upon plaintiff's premises, and torn down so much of the dam as occasioned the overflow, he would have exercised a

Adams v. Conover.

right and evicted the plaintiff from the enjoyment of a part of the property conveyed by the deed. He did this just as effectually by his action for damages. That vindicated his right and compelled by law a reduction in the height of the dam. The grantee therefore was not merely deprived of an easement in another's land which was not conveyed, and which his deed did not purport to convey, but he lost by force of the paramount title a thing actually conveyed, included within the metes and bounds of his deed, and just as much property granted by that conveyance as if it had been a particular acre of the land. Considering the subject-matter of the grant, the peculiar character of the property as a water-power and a mill-site, the existence of the dam at a height essential to that power, and to the full enjoyment of the property, we hold that the deed conveyed the dam at its existing height, and the covenant of warranty was broken when the grantee was compelled in whole or in part to take it down. The case therefore does not come within the rule of *Green v. Collins*, nor is it like *Burke v. Nichols*, 2 Keyes, 670. In neither of these cases was the grantee evicted from any thing which passed by the grant. That plain line of distinction separates both from a case like the present, where the thing lost was covered by the conveyance, and embraced within its description, and the deed both conveyed, and as we construe it, purported to convey the identical thing destroyed by a paramount title. The justice of the rule is entirely clear. It does not permit the vendor of an apparent water-power to get a price for what he does not own, or indulge him in a palpable fraud upon his vendee. It rests upon the general principle that the covenants in a deed are designed to protect the grantee in the enjoyment of his property, in the manner and for the particular purpose intended by the parties at the time of executing the deed. *Comstock v. Johnson*, 46 N. Y. 615; *Voorhees v. Burchard*, 55 id. 102.

It is further objected that the plaintiff purchased with full knowledge of the overflow of Felts' land and was chargeable with notice of his claim. We have discovered no evidence of any such fact. The careful and excellent brief of the learned counsel of the appellant turns our attention upon this point to but a single item of evidence, and that seems to us inadequate for the purpose. The plaintiff was told that Loveland, whose land as matter of fact adjoined Felt's, had sued the defendant for damages occasioned by the raising of the dam; that it had been raised and the defendant

it from the one then before us. It is there repeated that "a lessor of premises not *per se* a nuisance, but which become so only by the manner in which they are used by the lessee, is not liable therefor."

If there is fault on the part of any one, save the plaintiff in this case, the rule applies here. It was thought not to apply in the case cited, because the pier then in question was so defective and insecure when leased, that the subsequent injury received in the proper use of it, as if sound, was consequent upon its original condition. *Robbins v. Jones*, 15 J. Scott, 221 ; 109 Eng. C. L. Rep. 220, goes further and meets the position of the plaintiff, that the defendant is liable because the premises were unsafe when let. There the court held that a landlord who lets a house in a dangerous state is not liable to the tenants, customers or guests for accidents happening during the term. Whether this is a sound rule for all cases may be doubted ; but to danger, arising from the arrangement of the premises in question, to employees of the tenant, it may well apply. It is not needful to pursue the inquiry further, for we concur with the courts below in the conclusion that the evidence, whether given or offered, shows no misfeasance or nonfeasance on the part of the defendant, or any violation of duty toward the plaintiff.

The judgment in his favor was therefore right and should be affirmed.

Judgment affirmed.

All concur.

MEAD V. STRATTON.

(87 N. Y. 498.)

Civil Damage Act — death — owner of premises — husband and wife.

In an action under the Civil Damage Act, for injury to the wife's means of support, a recovery may be had for the husband's death. *

A wife, owning a building and knowingly permitting her husband to carry on the business of selling intoxicating liquors therein, is liable under the Civil Damage Act, and so, it seems, although her title and the joint possession were acquired before the passage of the act.

* See contra, *Barrett v. Dolan* (180 Mass. 366), 39 Am. Rep. 456.

Mead v Stratton.

ACTION under the Civil Damage Act. The opinion states the case. The plaintiff had judgment below.

James Wood, for appellants.

J. B. Adams, for respondent.

MILLER, J. This action was brought by the plaintiff, who was the wife of Charles Mead, deceased, to recover damages sustained in her means of support by the death of her husband in consequence of intoxication produced by liquor sold to him by said defendant Isaac S. Stratton, at the hotel kept by him, of which the said Margaret M. Stratton, the wife of the said Isaac J. Stratton, was the owner ; and which it is claimed she rented to her husband, or permitted to be occupied as a hotel, knowing that intoxicating liquors were to be and had been sold upon said premises.

The complaint alleges that in consequence of the acts of the defendants stated and set forth, and in consequence of the intoxication of the late husband of plaintiff, caused as aforesaid, plaintiff had been injured in her means of support and property.

The essential facts established by the verdict were that the defendant, Isaac J. Stratton, was the keeper of the hotel, and the deed was given to his wife who had general charge of the house, except the bar, but was cognizant of the fact that intoxicating liquors were sold there ; that the deceased came to the house with a horse and buggy, drank intoxicating liquors several times there, and became so much intoxicated that he was helped into his buggy upon starting for home ; that he must have fallen in his buggy, as he was found dead, with his knee caught tightly under the iron cross or foot bar, and his head over between the wheel and the wagon, so that his head was beaten by the spokes and otherwise injured ; and that he left a wife and several children who were dependent upon him for support.

The statute (chap. 646, Laws of 1873) under which this action is brought provides, that every husband, wife, etc., “ or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication *
* * shall have a right of action in his or her name against the person who shall, by selling or giving away the intoxicating liquors, cause the intoxication * * * and any person or persons own-

ing or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable, severally or jointly with the person or persons selling * * * for all damages sustained and for exemplary damages." The statute cited provides for a recovery by action for injuries to person or property or means of support, without any restriction whatever. Both direct and consequential injuries are included, and it was evidently intended to create a cause of action unknown to the common law, and a new ground and right of action. *Volans v. Owen*, 74 N. Y. 526 ; s. c., 30 Am. Rep. 337.

The injury to the means of support was one of the main grounds of the action, and when the party is deprived of the usual means of maintenance, which he or she was accustomed to enjoy previously, by or in consequence of the intoxication or the acts of the person intoxicated, the action can be maintained. *Id.* It is evident that the legislature intended to go in such a case far beyond any thing known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in producing, or who caused such intoxication. While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. The evident object was to suppress the sale and use of intoxicating liquors, and to punish those who, in any form, furnished means of intoxication, by making them liable for damages which might arise, which were caused by the parties who furnished such means. If the injury which had resulted to the deceased in consequence of his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would no doubt be embraced within the meaning and intent of the statute. That death ensued in consequence thereof furnishes much stronger ground for a claim for a loss of means of support ; and a different rule in the latter case would make provision for the lesser and temporary injury, while that which was greatest and most serious would be without any remedy or means of redress. Such could not have been the intention of the law-makers, and the statute was designed to embrace and must manifestly cover and include all injuries produced by the intoxication, and which legitimately result from the same. If it is an injury which can be repaired by damages, as that arising from a temporary disability, or one where death comes as a

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natural and legitimate consequence of the intoxication, a case is made out within the statute which entitles the injured party to recover such damages. The argument that in this case it was the remote cause, and not the natural and proximate cause of the act of the defendant, would apply with equal force if death had not followed, and we think has no point under the peculiar circumstances of this case.

There are some decisions in the Supreme Court of this State which bear upon the subject. In *Hayes v. Phelan*, 4 Hun, 733, the opinion holds that the statute gave a right of action only in cases where it lies against the intoxicated person. This conclusion does not however appear to have been sustained by a majority of the judges constituting the General Term and in a note to *Dubois v. Miller*, 5 Hun, 335, an opinion of JAMES, J., is published, dissenting from the views expressed in *Hayes v. Phelan*, and it is stated that BOARDMAN, J., concurred only in the result arrived at in the decision, and only two justices were present. In *Brookmire v. Monaghan*, 15 Hun, 16, where the complaint asked damages only by reason of the plaintiff's husband, which it was alleged was caused by intoxication by liquor sold the deceased by the defendant, it was held that the complaint did not state a cause of action under the Civil Damage Act, and it was said that the court had heretofore decided, in *Hayes v. Phelan*, that such damages are not recoverable under the act of 1873. The same question arose in the fourth judicial department in *Jackson v. Brookins*, 5 Hun, 530; and it was there held, that where several persons became intoxicated. and engaged in an affray in which one is killed, his widow may maintain an action against the person who sold the liquor which caused the intoxication, to recover damages sustained by her for the death of the husband. The same doctrine is upheld in *Smith v. Reynolds*, 2 Hun, 128. In *Quain v. Russell*, 8 id. 319, in the third department, it was held by a majority of the court, that it was not essential to the existence of the cause of action, under the Civil Damage Act, against the vendor of liquors, that an action should also be maintainable against the intoxicated person, and it is sufficient if the wife has been injured in her means of her support through the intoxication of the husband. The case of *Hayes v. Phelan* is referred to, and it is said that no such principle as is claimed in the last case was decided by the court. It will thus be seen that the decisions of the Supreme Court in this State are not entirely har-

monious. In the State of Illinois it is held that the action will lie when death ensues. See *Schroder v. Crawford*, 94 Ill. 357 ; s. c., 34 Am. Rep. 236 ; *Hackett v. Smelsley*, 77 Ill. 109. The same rule is upheld in Nebraska (*Roose v. Perkins*, 9 Neb. 304 ; s. c., 31 Am. Rep. 409) ; and in the State of Iowa. *Rafferty v. Buckman*, 46 Iowa, 195. Some exceptions are made by the courts of Illinois when the person intoxicated is killed in an affray, or when death results from exposure. *Shugart v. Egan*, 83 Ill. 56 ; *Schmidt v. Mitchell*, 84 id. 195. It is not necessary to decide whether these decisions are based on a sound principle, as no such question arises in the case at bar. Cases are also cited from Indiana, which are claimed to be adverse to the views expressed. See *Krach v. Heilman*, 53 Ind. 517 ; *Collier v. Early*, 54 id. 559 ; *Backes v. Dant*, 55 id. 181. In *Krach v. Heilman*, *supra*, the person intoxicated was killed in an affray. The last two cases cited are somewhat analogous to the case at bar, but the decision of the court is not, we think, well supported in either of them. It is also held in Ohio, that under the act in that State in relation to the sale of intoxicating liquors for injury to the means of support in consequence of intoxication which caused death, no recovery of damages can be had. *Davis v. Justice*, 31 Ohio St. 359 ; 27 Am. Rep. 514 ; *Kirchner v. Myers*, 35 Ohio St. 85 ; 35 Am. Rep. 598. We cannot concur in such an interpretation of the act in question, and for the reasons already stated are of the opinion, that if the death of the deceased was a result necessarily following the intoxication, and was attributable to such intoxication, an action will lie to recover the damages arising to the means of support of the plaintiff by reason thereof. While thus holding it is not necessary to decide whether a person producing the intoxication would be liable when death ensued by reason of an affray caused thereby, or under different circumstances from those which are presented in the case at bar. Nor are we called upon to consider in this case the effect of the statute so far as it affects the right of action of the children of the deceased for damages sustained by each of them, as that question is not now presented. The conclusion follows, that there was no error committed by the judge upon the trial in any of his rulings in regard to the question considered.

A claim is also made, that the judge erred in refusing to dismiss the complaint, or to nonsuit the plaintiff as to the defendant Margaret M. Stratton. The title to the hotel was in her, and she lived there with her husband, having charge of the

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domestic arrangements in conducting the business of the hotel. There is evidence tending to show that she had knowledge that her husband was engaged in the business of selling intoxicating liquors, and that he intended to, and did actually, carry on and prosecute such business. Under the evidence it was a question of fact for the jury to determine, whether she had knowledge that the building was occupied and used by her husband for any such purpose. And this result was to be arrived at after a due consideration of the relations existing between the husband and his wife, and the circumstances surrounding the case. It cannot, we think, be claimed that as a matter of law the husband was in possession, and that the wife was relieved from liability as the owner of the property, who had no knowledge of the sale of intoxicating liquors. Whatever his rights may have been at common law, if she was the owner and knew that the business of selling intoxicating liquors was conducted there, she cannot evade responsibility. The statute does not, as is claimed, provide that the person must not only own, but rent the premises, but if there is either an "owning or renting," with knowledge, it is sufficient to create a liability. The proof of ownership was clear, and there was proof tending to show that the occupation was permitted with knowledge of the purpose of selling intoxicating drinks.

The claim that Mrs. Stratton, even if she was the owner of the premises, does not come within the provisions of the statute, so as to render her liable, is based upon the fact that she had the title when she and her husband went into possession, and that the act of the legislature upon which this action is founded was passed afterward. The position is, that the statute was not intended to be retroactive. The statute had been in operation some time when the sale of the liquor was made, and in the absence of direct proof it can hardly be assumed that the original possession was to be, and actually was, continued without regard to any future change of the law or obligations of the parties, and that for this reason they were to be exempted from the operation and effect of all future legislative enactments, and we are unable to discover how the doctrine contended for can be invoked under the circumstances. Such a rule would screen a party for an unlimited period of time from the operation of a statutory enactment, and clearly cannot be upheld. The presumption is, that the possession originally taken was continued in view of

the laws of the State as they were thereafter enacted. It is not pointed out, and we do not see that this question was distinctly raised upon the trial.

A question is also raised, as to whether, considering the relations between the defendants, there was such a permission to occupy as would make her liable under the statute. The judge charged the jury that the "question, so far as Mrs. Stratton was concerned, was whether she permitted the occupation of the building by her husband, knowing that intoxicating liquors were to be sold on the premises — permitting them to be sold," thus leaving it for them to determine as to the permission to occupy. The permission referred to was not confined by the judge in his charge strictly to the time when the husband went into possession, but may have arisen from subsequent occupation, or from inferences to be derived therefrom. It is not important we think to consider whether the strict relation of landlord and tenant existed, if Mrs. Stratton was the owner, and permitted her husband to occupy with the knowledge of the business in which he was engaged of selling intoxicating liquors. There was no error in any portion of the charge to which exceptions were taken, or in the refusal to charge as requested, or in any other of the rulings on the trial.

The judgment was right, and should be affirmed.

Judgment affirmed.

All concur, except RAPALLO, J., taking no part.

QUINN v. POWER.

(87 N. Y. 586.)

Master and servant — course of employment.

Defendant owned and ran a ferry-boat between Hudson and Athens on opposite sides of the Hudson river. On a regular trip the pilot took on a boatman without compensation, agreeing to put him on his boat in a tow passing up the river. Similar acts had occasionally been done before, but not to defendant's knowledge. The ferry-boat diverged from its regular course, and negligently colliding with a canal-boat, killed the plaintiff's intestate. *Held* that defendant was liable.*

* *Noblesville, etc., Co. v. Gause* (76 Ind. 142); 40 Am. Rep. 224, and note, 226; *Hoffman v. N. Y. Cent., etc., R. Co., ante*, 337.

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ACTION for death by negligence. The opinion states the case. The defendant had judgment below.

Jesse Johnson, for appellant.

J. O. Newkirk, for respondent.

FINCH, J. The dispute here is over the application of a general rule to a particular transaction, neither party questioning the rule, but each following it to a result favorable to himself, and fatal to his adversary. That the master is liable for the negligence or misfeasance of the servant while the latter is acting in the master's business, and within the scope of the servant's employment, is not disputed. *Rounds v. Del., L. & West. R. R. Co.*, 64 N. Y. 129; s. c., 21 Am. Rep. 597; *Cosgrove v. Ogden*, 49 N. Y. 255; s. c., 10 Am. Rep. 361; *Ochsenbein v. Shapley*, 85 N. Y. 214. Nor is it denied that such liability exists notwithstanding the fact that the servant's negligent act is contrary to the master's direction, and as between the two, a violation of the duty which the latter owes to the former. It is not correct therefore and leads to an erroneous result, to describe the master's freedom from liability as arising where the servant has departed from his "line of duty in" his master's business, which is a mode of stating the rule adopted in the opinion of the General Term upon the first argument of this case before that tribunal. Such a statement of the law might excuse every deviation from the master's orders, and substitute a new and very dangerous test of liability. In the case of *Rounds*, we have already had occasion to say, the rule is stated with all the precision and accuracy which is possible from the nature of the case, and we need only to follow its guidance to reach a satisfactory result.

The injury here complained of arose from the act of the defendant's servants in charge of his ferry boat, running across the river between Hudson and Athens, and transporting passengers and freight between those two points, in stopping mid-river to land a passenger upon a canal boat forming part of a tow on its way to Albany. A collision arose, as a consequence of which the plaintiff's intestate, who was on board of the canal boat was thrown into the river and drowned. We must assume, for our present purpose, that there was enough in the facts of the occurrence to raise a question of negligence for the consideration of the jury, since that was

conceded by the General Term, and we think was warranted by the circumstances attending the transaction; but while we proceed upon that assumption, nothing which we may find it necessary to say must be construed into any expression of opinion upon the fact. To determine that will be the sole duty of the jury. The passenger landed upon the tow came on board at Athens by the invitation of the pilot, who transferred him to the canal boat as a matter of favor and apparently without compensation. In doing this the ferry boat deviated from its usual track or route across the river. Similar acts had been occasionally done before, though without the knowledge or express authority of the master.

It is now argued on behalf of the respondent that the persons in charge of the boat were not acting, when the collision occurred, in the master's business, or within the scope of their employment, but in the execution of an independent purpose of their own not connected with the master's business, and for the results of which they only were responsible. We do not concur in this view of the transaction. At the most it appears to us a case where the servant, while acting in the master's business, and within the scope of his employment, deviated from the line of duty to his master and disobeyed his instructions.

When this ferry boat left the dock at Athens it started for its terminus at Hudson. It took freight and passengers to transfer across the river; servants and boats, as the latter moved out into the river were doing the master's business and acting both in the line of duty and of employment. There was a usual track or route by which the boat crossed. It may even have been selected and dictated by the owner. In deviating from it the servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting passengers from Athens to Hudson because they did not follow the usual route, or pursued another or even a forbidden track. They were still doing their employer's work, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river they did not cease to be engaged in the master's business. Even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way and manner to subserve also such purpose. When they took this passenger to the tow, and in so doing deviated from the usual route and stopped the boat mid-river for that reason, they were still en-

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gaged in the master's business of transporting freight and passengers across the river. They were doing it in a mode and manner perhaps not authorized, and possibly in some sense, to effect a purpose of their own, but none the less acting within the scope of their employment and engaged in the master's business. In *Joel v. Morrison*, 6 C. & P. 501, it was held that if a servant driving his master's cart on his master's business, make a detour from his regular and usual route for some purpose of his own, his master will be liable for damages resulting from an injury occasioned by the careless driving of the servant while out of his road. In *Sleath v. Wilson*, 9 C. & P. 607, it was said that whenever the master has intrusted the servant with the control of his carriage, it is no answer that the servant acted improperly with it, and therefore where the servant having set his master down, was directed to put up at a particular place and went out of his way to deliver a parcel of his own, and in so doing injured a third person, it was held that the master was liable. The latter of these cases was cited with approval in *Phil. & Read. R. R. Co. v. Derby*, 14 How. 486, and the question was said to be, in all such cases, not whether the servant was obeying or disobeying the master's orders, but whether he was acting in the course of his employment, or in other words, whether he was or was not at the time in the relation of servant to the defendant. These cases are useful to illustrate the idea that there may be a deviation from the servant's duty in his employment, and that too for some purpose or from some motive of his own, without his ceasing to be an actor within the scope of his employment and in the range of his master's business; but yet our own decisions must be the final and controlling authority, so far as they have application, though none of them are quite like the present case in their facts. They all however agree in the one important respect, that a violation of the master's instructions, or a departure from the strict line of duty due to him from the servant does not necessarily make the latter alone liable. The case is put by the appellant, mainly on the ground that the officers of the ferry-boat in transferring the passenger to the canal boat, were simply doing the latter a personal favor, and so carrying out a separate and independent purpose of their own. That is not in all respects a correct view of the transaction. The passenger appears to have been an entire stranger. There was no individual or personal motive to induce the pilot to invite him on board or promise to land him at the tow;

what operated to lead to the act was plainly a motive connected with the master's business. The ferry boat, in previous years, had done a very considerable business in towing to Athens or Hudson, boats taken from the tows, or placing them in, for which services compensation was paid. The defendant finally built or procured a separate boat to be used in that business. The canal boats arriving in tows were more or less his customers, and their captains or owners were naturally to be treated with consideration as a matter of business. When the pilot saw this boatman standing on the dock, and anxious to reach his tow, the pilot did what he thought the master would very probably have done if present, promised to put the boatman on the tow. In doing so he had no individual or personal purpose of his own, separate from his master's business and interest. On the contrary it must have been that business and interest, a disposition to gain and keep the good-will of the boatmen as a class, from among whom came the master's customers, which prompted the invitation and the act. The facts disclose no other possible motive, certainly none which was personal to the pilot and entirely independent of his master's business. Even if unwisely or mistakenly done the act was done by the pilot in the interest and for the supposed benefit of the master. Whatever of good-will or good disposition was likely to flow from this and similar acts of favor to the boatmen would redound, not so much to the personal benefit of the pilot, but to the ferry boat and its owner. Unless this motive influenced the act it is unexplainable except upon the idea of general good nature and disposition to accommodate. But even that was in the master's business, and amounted only to a disposition to conduct it as far as possible so as to please and favor all kinds of passengers. It is difficult therefore to trace in the action of the pilot any separate and independent purpose, disconnected from the master's business. What he did was in the natural line of his employment, might well have been regarded by him as a duty due to his master, and an act which would benefit rather than injure his business. It was an act within the general scope of that employment; it was the transportation of a passenger; if not across the river, at least, partly across; and none the less so because no compensation or fare was demanded. To hold that in this trip across the river the officers of the boat were acting as the owner's servants and in his business only at the beginning and end of the passage, and not in the middle because stopping

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to put a passenger on a tow instead of taking him across to Hudson, seems to us an unwarranted conclusion. The motive which prompted the act, and the purpose sought by it, if originating with the pilot, and in some sense personal to him, were at least not independent or outside of his employment, or disconnected with the master's business. Indeed, it is not difficult to see, that in the absence of an express prohibition which was not proved in the case, the act was plainly and fairly within the discretion, which, as was said in the *Rounds* case, the master impliedly must be held to have conferred upon the servant intrusted with the use of his property and the management of the business for which it was provided. The servant did only what the master might naturally have done in the transaction of his own business if he had been personally present, and actively in command. We think therefore the master was responsible for the negligence of his servants in charge of the boat, if such negligence existed.

The judgment should be reversed and a new trial granted, costs to abide the event.

Judgment reversed.

All concur, except MILLER, J., not voting.

WATSON V. PEOPLE.

(87 N. Y. 561.)

Criminal law — false pretenses — character of horse.

An influential and intentionally false representation by the seller to the purchaser on the sale of a horse, that the horse is sound, kind and true, the falsity not being apparent, is indictable as false pretenses. (*See note, p. 401.*)

CONVICTION of false pretenses. The opinion states the point.

William F. Kintzing, for plaintiff in error.

John McKeon, district-attorney, for defendant in error.

MILLER, J. The question in this case is, whether a representation to the effect that a horse was sound, kind and true, which

was false and known to be such and was made with intent to cheat and defraud the purchaser, accompanied by a written warranty, upon which money was obtained, is a criminal offense within the meaning of the statute of this State against false pretenses. That such an offense may be committed when the representation is false, and is made designedly by the prisoner with full knowledge of its falsity, and with an intent to cheat and defraud the party defrauded, we think admits of no serious question. The statute was intended to supply a supposed defect which existed at common law and to make provision for the punishment of offenders who by false representations and ingenious devices sought to procure property or money from others. It is directly aimed against and intended to embrace every offender, who with intent to cheat and defraud another shall designedly, by color of any false token or writing, or by any other false pretense obtain the signature of any person to a written instrument, or any money, personal property or valuable thing. 2 R. S. (Edm. ed.) 697, § 53. Every species of fraudulent pretenses is included within the comprehensive terms employed, and it matters not what the nature of the transaction is, if money be obtained in the manner and by the means indicated in the statute. So long as there is a false representation designedly made, with the intent to cheat and defraud, it is enough to satisfy the requirement of the law. It is true that it must be a representation which affects and influences the mind of the prosecutor and induces him to sign the instrument, or to part with his money or property, and to surrender it by reason thereof. The question to be determined is, whether the false pretense charged and proven is of such a character that it is capable of defrauding and that the prosecutor could have been deceived by it. In some of the cases decided soon after the enactment of the statute in this State, as well as the English statute which is of a similar import and substantially the same as the first named statute, there was some hesitation as to whether it should not be interpreted, having in view the restriction which existed at common law in cases of a similar character. But this disposition has yielded to a more just construction so as to give full force and effect to the statute, and to furnish protection to those who from undue confidence in others, or inexperience, are liable to become the victims of dishonest, artful and designing dealers. This interpretation is more consistent with the intention of the law makers and the object in contemplation, which was evidently to make a party responsible

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criminally for any false representation of a material fact designedly made with a fraudulent purpose in view, and which did have the effect to cheat and defraud another. This rule has generally been upheld in the decisions in this State with the exception perhaps of *People v. Williams*, 4 Hill, 9, which may be regarded as tending in a different direction, although the precise point which now arises was not in that case. The later cases of *People v. Crissie*, 4 Denio, 525 ; *Thomas v. People*, 34 N. Y. 351 ; *People v. Sully*, 5 Park. 143, affirmed upon appeal to this court, *People v. Oyer & Terminer*, 83 N. Y. 436, are in a contrary direction. In *People v. Crissie*, *supra*, the indictment alleged that the defendants falsely pretended to a third person that a drove of sheep which were offered for sale were free from disease and foot-ail, and that a lameness which was apparent in some of them was owing to an accidental injury, by means of which he obtained a certain sum of money in the sale of the sheep. It was held that this was a false pretense within the statute. This case comes very near in its leading features to the one at bar, and there is in fact no manifest distinction in principle between them, both being, we think, covered by the statute. In *People v. Oyer & Terminer*, *supra*, it is laid down distinctly, after referring to some of the reported cases in this State, that the pretenses must be calculated to deceive, leaving that to be determined by the jury, and if the pretense was capable of defrauding, it is sufficient. The English decisions fully sustain the doctrine that it is enough that the pretense was made knowingly and the money obtained thereby with the intent to defraud and that the pretense was false to the knowledge of the person making it. *Hamilton v. Queen*, 9 Ad. & El. (N. S.) 271, 278 ; *Reg. v. Wickham*, 10 Ad. & El. 34. The counsel for the prisoner cites numerous cases to support the proposition that the warranty of a horse to be sound is nothing more or less than a warranty as to quality, and that in such a case no offense is made out in violation of the statute. It may be remarked that most of the cases relied upon are under the common law before the passage of the English statute, increasing offenses of this description so as to include within its terms all kinds of false pretenses, whether such as are made by means of false tokens, or by false verbal statements made designedly with an intent to obtain money or property and to cheat and defraud.

Before the statute was enacted, and at common law, only such pretenses as were made by means of false tokens, or by a conspiracy

to cheat and defraud, or by such acts as affected the public, such as false weights and measures, were the subject of punishment. The statute which was intended to remedy these defects created new offenses and extended the law so as to give it a larger field of operation and embrace a different class of cases than what had previously been known and recognized as offenses. This change in the law renders many of the cases cited inapplicable. This distinction is referred to in the opinion of the General Term and some of the leading cases are there considered and commented upon. There is no merit in the position that the prosecutor had at hand, at the time of the purchase, the means of detecting the fraud, and therefore the offense was not within the statute. This point was not distinctly raised by any request to charge, or otherwise, and although ordinarily an indictment will not lie for a naked falsehood, yet when all the circumstances evince that the representation was made designedly, with an intent to cheat, and was calculated to deceive and capable of defrauding, the prisoner cannot excuse himself by saying that if you had been sharp, vigilant and astute, you could have detected the fraud. When there is an absolute representation, false and untrue and known to be such, the purchaser of property has a right to rely upon it. Where a statement is made, as the evidence establishes in the case at bar, that a horse is sound, kind and true, and it is not apparent that it is not, and that immediately afterward it appears that it was utterly worthless, broken down so as to be incapable of being delivered, a representation is made which is capable of defrauding on its face, and the party is no more bound to take out the horse and try him, for the purpose of ascertaining whether the representation is true, than he would be to try any other article of personal property he is about to purchase, which was apparently whole and yet so defective that it might fall to pieces upon being moved. He has a right to rely upon the representation, and common honesty and morality demand that the fraudulent dealers should not screen themselves by the excuse that the party could have detected the fraud if he had not relied on the representation made. Nor does the fact that there was a warranty relieve the prisoner from the effect of the false pretenses under which he obtained the money. It would not exempt the prisoner from the consequence of a false pretense made as to an existing, additional, material fact, because it was combined with a promise for the future. *Reg. v. West*, 26 L. J. (N. S.), Mag. Cases, 6 ; 31 id. 146. .

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The evidence upon the trial showed a case of gross imposition and fraud practiced upon the prosecutor, and an offense within the statute. The court very properly refused to direct the jury to find a verdict of not guilty as requested by the prisoner's counsel, and there was no error upon the trial.

The conviction should be affirmed.

Judgment affirmed.

All concur, except ANDREWS, O. J., and TRACY, J., dissenting.

NOTE BY THE REPORTER.—In *State v. Stanley*, 64 Me. 157, the court said: "The assertion of the soundness of his horse by the defendant is the assertion of a material fact. It is false. It was made to deceive and defraud. It accomplished its purpose. Thus much the demurrer admits. It is not readily perceived why this falsehood is not within the spirit, as well as the letter, of the statute.

"In *State v. Mills*, 17 Me. 211, the owner of a horse represented to another, that his horse, which he offered in exchange for the property of the other, was a horse known as "The Charley," when he knew that it was not the horse called by that name, and by such representation obtained the property of the other person in exchange, it was held that the indictment was sustained, although the horse said to be the Charley was equal in value to the property received in exchange, and as good as the Charley. So the statement that the property is unincumbered, when the fact is otherwise, will sustain an indictment for cheating by false pretenses notwithstanding there may have been a warranty, if the false pretense and not the warranty was the inducement which operated upon the party to make the exchange. *State v. Dorr*, 33 Me. 498. In *People v. Crissie*, 4 Denio, 525, an indictment alleging that the defendants falsely pretended to a third person that a drove of sheep which they offered to sell him were free of disease and foot-all, and that a certain lameness, apparent in some of them, was owing to an accidental injury, by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words and an averment negating the facts represented, was held good under the statute against cheating by false pretenses. In *Rex v. Jackson*, 3 Camp. 370, it was held to be an offense to obtain goods by giving a check on a banker with whom the drawer kept no cash. So the representation that a bank check was a good and genuine check and would be paid on presentation, when the drawer had no funds in the bank on which it is drawn, is a false pretense. *Smith v. People*, 47 N. Y. 303. So false representations as to quantity may constitute a false pretense for which the person so falsely representing may be indicted. *Reg. v. Sherwood*, 40 E. C. L. 535. So by giving false samples, *Reg. v. Abbott*, 1 Den. O. C. 379. In *Reg. v. Kenrick*, 48 E. C. L. 49, the false pretense was that the horses were the property of a private person and not of a horse dealer, and that they were quiet and tractable, and Lord DEWMAN, C. J., says, 'The pretenses were false, and the money was obtained by their means,' and the indictment was sustained. In that case the purchaser wanted a quiet and tractable horse, in the one at bar a sound one was wanted. In that case as in the one at bar, the false representation was effective to defraud.

"A false pretense may relate to quality, quantity, nature or other incident of the article offered for sale, whereby the purchaser relying on such false representation is defrauded. *Reg. v. Abbott*, 61 E. C. L. 639. A mere false affirmation or expression of an opinion will not render one liable. It must be the false assertion of a material fact with knowledge of its falsity. *Bishop v. Small*, 63 Me. 12; *Rex v. Reed*, 33 E. C. L., 904. No harm can happen to any one from abstinence in the making of false representations. When made, and material and effective for deception, no sufficient reason is perceived why the guilty party should escape punishment."

SMITH v. POILLON.

(87 N. Y. 590.)

Negotiable instrument — notice of dishonor — when timely.

The second indorser of a negotiable note, residing at Warren, Maine, having received due notice of dishonor by mail, being over eighty years old and wishing to consult counsel, drove on the same day to the neighboring town of Thomaston, and there mailed to defendants notice of dishonor, addressed to them at New York, their residence, by the mail leaving at 1:40 P. M. which passed through Warren at 2 P. M. There was also a mail leaving Thomaston at 10:10 A. M. and Warren at 9:30 A. M. *Held*, timely notice.

ACTION on a promissory note. The head-note and opinion state the facts. The plaintiff had judgment below.

Albert A. Abbott, for appellants.

James McKen, for respondent.

EARL, J. [Omitting other considerations.] Smith was an aged man, upward of eighty years old. On the morning of March 7, he took the notices for the defendants and drove to Thomaston, for the purpose of consulting his counsel, and there, under the advice of his counsel, he wrote a letter addressed to the defendants, and inclosed it with the notice for the defendants in an envelope addressed to them, and caused it to be mailed at Thomaston, in time for the mail which left there for New York, the residence of the defendants, at 1:40 P. M. That mail passed through Warren, on its way to New York, at 2 P. M. There were two mails each day from Warren, one closing at about 9:30 A. M., and the other at about 1:30 P. M., and that letter went in the same mail that closed at Warren at 1:30. The contention on the part of the defendants is, that the law required that that notice should have been mailed by the first convenient, practicable mail on the 7th, and hence that it should have been mailed by the first mail on that day; and to sustain their contention, our attention is called to various authorities. *Smedes v. Utica Bank*, 20 Johns. 372; *Mead v. Engs*, 5 Cow. 303; *Sewall v. Russell*, 3 Wend. 276; *Howard v. Ives*, 1 Hill, 263; *Haskell v. Boardman*, 8 Allen, 38; *Sussex Bank v. Baldwin*, 2 Harrison (N. J.), 487; *Burgess v. Vreeland*, 24 N. J. 71; *Lawson v.*

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Farmers' Bank, 1 Ohio St. (N. S.) 206; *Freeman's Bank v. Perkins*, 18 Me. 292. These authorities, while not entirely harmonious, undoubtedly tend to sustain the rule that the notice must be sent on the next day by the first practicable and convenient post.

The counsel for the plaintiff however contends that the rule is, that notice of dishonor in such cases may be sent to the prior party by any post of the next day, and he calls our attention to several authorities which tend to sustain his contention. *Chick v. Pillsbury*, 24 Me. 458; *Whitwell v. Johnson*, 17 Mass. 449 (9 Am. Dec. 165); 2 Dan. Neg. Inst. 87; Story on Bills, § 288; Story on Prom. Notes, § 324; 3 Kent Com. 106.

From a careful examination of all these authorities and many others it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practicable and convenient mail of the next day; and that rule seems to be supported by the most authority in this State. What is a practicable and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law.

In *Mead v. Engs*, 5 Cow. 303, notices of dishonor of a bill reached the post-office at the residence of the last indorser at 5 P. M., and actually came to his hands the next morning. The first mail thereafter for the residence of the prior party left at 1 P. M., but the notices for that party were not mailed until after that hour. SUTHERLAND, J., said: "The cashier was not bound in the exercise of due diligence to have prepared and forwarded notices by the one o'clock

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mail ; it is not reasonable to demand from him the neglect of his other official duties to prepare his letters and notices during the usual banking hours ;” and further, that “ the law does not require the holder of a bill or note to give the earliest possible notice of its dishonor ; it requires of him only an ordinary and reasonable diligence ; nor is he bound, the moment he receives notice of the dishonor of a bill, to lay aside all other business and dispatch notice to the prior parties to the bill ; if reasonable diligence is used, it is sufficient.” In *Darbishire v. Parker*, 6 East, 3, Lord ELLENBOROUGH observes : “ There must be some reasonable time allowed for giving notice, and that, too, accommodating itself to other business and affairs of life ; otherwise it is saying that a man who has bill transactions passing through his hands must be nailed to the post-office, and can attend to no other business, however urgent, till this is dispatched.”

It does not appear here how far Mr. Smith lived from the post-office at Warren ; he was an aged man and wanted some advice about the matter. Early on the day after he received the notice, he went to Thomaston to see his counsel, and thus he missed the mail, which closed at Warren at 9:30. We think it cannot be said that the delay was unreasonable, or that there was the absence of that proper diligence which the law requires. There was therefore no error in holding as matter of law that due diligence was used by Smith in posting the notice to the defendants.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur.

CASES

OF THE

SUPREME COURT

OF

KANSAS.

MASON V. MISSOURI PACIFIC RAILWAY COMPANY.

(87 Kans. 88.)

Negligence — contributory — trespasser on railway track — custom.

A railway company constructed, for its track, in an ungraded and unimproved city street, an elevated embankment, and in connection with it a trestle-work crossing a creek high above the water, without railings or flooring. The plaintiff's wife while attempting to walk over the trestlework was injured by a car. *Held*, that the plaintiff was without remedy, in the absence of wanton negligence on the defendant's part, and that proof of a custom of foot passengers to cross the trestle-work was improper.*

ACTION by husband for loss of services of wife by reason of injury negligently inflicted. The opinion states the case. The defendant had judgment below.

D. B. Hadley, for plaintiff in error.

E. J. Sherlock, for defendant in error.

HORTON, C. J. [Omitting minor matters.] Plaintiff complains that the court erred in ruling out evidence concerning the custom

*See *Houston and Tex. Ry. Co. v. Symptoms* (54 Tex. 615), 36 Am. Rep. 622. But one crossing a railway track by a common and well-known path is not a trespasser, and may recover for a negligent injury. *Phila., etc. R. Co. v. Troutman*, Penn. Sup. Ct., April, 1883.

of foot passengers crossing the bridge over Jersey creek, where his wife was injured, after two witnesses had testified thereto without objection. Unless the evidence was competent, the admission of like evidence in the first instance is no bar to the exclusion of other and further evidence of that character. Because some incompetent evidence is admitted without objection, other incompetent evidence is not thereby competent, if offered to prove the same fact. It appears from the record that the plaintiff, about the time she received her injuries, was going to her home. Instead of going upon Third street in the city, which was graded and sidewalked, she attempted to reach her home by a nearer route. In taking this course, it was necessary to cross Jersey creek, a few rods above where it empties into the Missouri river. The only way of crossing this stream at this place was by climbing upon the embankment of defendant's railway and passing from this upon the trestlework of the road over Jersey creek, by stepping from tie to tie. This the wife attempted to do. At the place where the trestle is located, the streets, as laid out on the plat of Wyandotte city, are unused for general travel, and at such place the streets have not been graded or improved. The bridge over the creek is iron, and has a span of over one hundred feet. It is thirty feet from the top of the trestle to the water in the creek, and the water under the trestle is from three to six feet deep. The embankment at the south end of the bridge is four or five feet at the fill and fifteen feet at the creek, and on the north side eight to ten feet at the fill and twenty feet at the creek. Jersey creek is about sixty feet wide at the bridge, and the banks on each side are perpendicular and from fifteen to twenty feet high. There are no railings to the bridge, and no foot-planks to walk upon. Considering the character of the structure erected, and the use to which it is applied by the defendant, we do not think there was any error in refusing to admit further evidence concerning foot passengers crossing it. It cannot be well said that such trestlework and bridge, as constructed, were either in law or in fact a public street. As there was no attempt to show that either the injured party or any other person was invited by the company to cross or travel upon the structure over the creek, or that the injured party was upon the structure with the consent of the company, the fact that other parties had crossed upon it did not make it less dangerous or less negligent for the wife of the plaintiff to attempt to do so. This is not a case where the legal right of the railway com-

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pany and that of the public to use such trestlework are about equal. The embankment and trestlework are so much elevated above the street, and are so erected for the purpose of operating thereon cars and engines only, as to apparently forbid foot passengers crossing the creek at this place ; therefore we do not think that the railway company was bound to operate its cars with reference to footmen undertaking the peril of attempting to step from tie to tie in crossing the long span over the stream, especially in view of the frequent running of the cars on the track of such trestlework. Counsel for plaintiff contends, that as the bridge lay wholly within two of the streets of the city of Wyandotte, called Front street and Wa-Was street, which cross each other at the point where the bridge crosses the creek, and as a street belongs to the public from the center of the earth to the heavens above, persons had the right to climb up the embankment, and to use the trestlework as a public street of the city. Not so. The embankment and trestlework were the property of the railway company. They were used for the purposes of the company in operating its cars and trains, and so built and constructed as to render any travel thereon perilous, even without the operation of cars upon the track. Whether the authorities consented to the construction of such embankment and trestlework is immaterial at this time. The railway company was in full occupation of it, and the public had no right to cross over such a dangerous structure, and knowing it to be unsafe for travel, to claim exemption from all negligence on their part, and charge the railway company with the fruits of their own imprudence.

This leads us to the consideration of the instruction given by the court, to the effect that if the plaintiff's wife was injured at a point not on the surface of a public highway or traveled street, but upon the trestle or embankment of the defendant's road-bed, then she had no right to be there, and was a trespasser, and if injured while trespassing by the act or negligence of the defendant's employees, before the defendant could be held legally responsible for such negligence of its employees, the negligence must be so gross as to amount to wantonness. Whenever a party infringes upon the rights of others, this negligence, or this wrong-doing, as the case may be, absolves others from using ordinary care and diligence toward each party. In brief, they are under no legal or moral obligation to be cautious and circumspect toward one who infringes upon their rights. *U. P. R'y Co. v. Rollins*, 5 Kans. 167. A railway com-

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pany has the exclusive right to occupy, use and enjoy its railway tracks, bridges and trestlework, and such exclusive right is absolutely necessary to enable such a company to properly perform its duties, and any person going upon, or using, or occupying the track or bridge of a railway company without the consent of the company is held in law to be there wrongfully, and therefore to be a trespasser. Now as the point where the plaintiff's wife was injured was not on the surface of a public highway or travelled street, but upon the trestlework or embankment of the defendant's road-bed, for all the purposes of this case the railway company had the exclusive right to occupy, use and enjoy such trestlework and embankment; therefore the instruction that the railway company was liable only for such negligence so gross as to amount to wantonness, was a correct declaration of the law to the jury. The plaintiff's wife climbed the embankment, and attempted to cross the trestlework or bridge without the consent of the company, and at her own peril; and the husband can recover only for injuries done to her for such negligence of the employees of the company as was so gross as to amount to wantonness.

The judgment of the District Court will be affirmed.

Judgment affirmed.

All the justices concurring.

CRANZ V. WHITE.

(27 Kans. 319.)

Pension-money — exemption — statute construction.

Under the statute exempting pension-money "in course of transmission," the money is not exempt where the pensioner sells the pension drafts to a bank and is credited in his general account with the proceeds, and portions of the same are from time to time checked out by him. (*See note, p. 411.*)

GARNISHMENT. The opinion states the case.

L. U. Humphrey and W. T. O'Connor, for plaintiffs in error.

Daniel Grass, for defendant in error.

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BREWER, J. The question in this case is one of exemption under the pension laws of the United States. The facts are these: To garnishee proceedings against the defendant in error, certain bankers garnished answered in these words:

“In the month of April, Mr. White came into the bank with pension checks or drafts to the amount of \$2,826.82. He indorsed the same and passed them to me, and I gave him or his account credit for the said sum. We took and bought the checks or drafts in the usual course of banking, and after passing the amount of the face of the checks to White's credit, sent the same to our correspondent at Kansas City or St. Louis for collection and returns as usual. Mr. White has checked out all of the said sum but four hundred and fifty dollars; which sum is now due him from us, being the balance of the proceeds of said checks, which we obtained from the defendant in the manner stated. The checks or drafts we obtained from him were pension drafts, and were given to him, as we understood in payment of a pension obtained by him from the government. The amount yet due him from us is a part of that which he obtained upon these pension checks or drafts, whatever they are called.”

The garnishee proceedings were commenced on May 16, and the answer made September 17. Upon this answer the District Court hold the property exempt, and discharged the garnishee; and upon this ruling, plaintiffs in error, plaintiffs below, come to this court. The exemption was sustained under the following section in the general pension act, U. S. Revised Statutes, p. 931, § 4747:

“No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or an officer or agent thereof, or in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner.”

Was this ruling of the court correct? The first question is as to the scope of this section of the United States statutes. Does it create an exemption of moneys in the hands of a pensioner or simply protect such money in course of transmission to him? The difference is obvious and vast. If the exemption attaches to the money absolutely, then practically the State exemption law is amended by a Federal statute. Counsel for plaintiffs in error earnestly contend that the Federal government has no power thus to

amend a State exemption law; that it cannot provide that money in the hands of one citizen of Kansas shall not be subject to seizure for the payment of his debts, when a like sum of money in the hands of every other citizen of the State is by the State law subject to such seizure. Their argument would be entitled to serious consideration if it appeared that such is the intent and scope of the Federal statute. But such is not the meaning of that statute; it does not attempt to invade the domain of State legislation in respect to exemptions; its simple and obvious purpose is to protect the donation while in transit to the pensioner. Its language is not, "no money in the hands of a pensioner," or "no pension money," but "no sum of money due or to become due to any pensioner." The protection is to an undelivered sum of money. This which is implied in the first words of the section is made more clear by its after language, for it prohibits seizure whether this sum of money due or to become due remains with the pension office or an officer or agent thereof, or in course of transmission to the pensioner entitled thereto. To guard against any abuse or destruction it thus specifies the various positions which money due or to become due can occupy, and in effect declares that pension money shall not be interrupted on its way to the pensioner. The last clause of the section which reads, "but shall inure wholly to the benefit of such pensioner," is qualified by and must be read in the light of the preceding words of the section. It is comprehensive language, but it is only language strengthening and making more plain the intention of the preceding words. It applies to money due or to become due, and not to money paid and in possession. Nowhere in the section is there reference to pension money in the hands of the pensioner. It does not purport to exempt money in such hands from the operation of State laws, either those of taxation, or the ordinary statutes concerning exemptions and indebtedness. It is doubtless true that such statute is to be liberally construed, and so construed that the pensioner shall acquire full possession of his pension, free from any interception directly or indirectly in the course of its transit. Now turning to the facts of this case, and it is evident that the defendant had acquired full and absolute control of his pension, he had sold it to the bank; it had been passed to his general account, and he had already used most of it. He had not simply deposited the drafts for collection, but he had sold them to the bank and the bank was his debtor for a

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balance upon his general account at the time of these proceedings. We have been referred to the case of *Eckert v. McKee*, 9 Bush, 355, in which the Supreme Court of Kentucky reached a conclusion different from that expressed by us in this opinion, and construed the statute as exempting the money itself even in the hands of the pensioner, and declared such an exemption within the power of Congress. It is very likely that on the facts as stated in the opinion in that case, even with the views we entertain of the scope of the Federal statute, we should have decided the case in the same way; for it would seem that though the pensioner had indorsed the check and sent it through an agent who had received the money from the bank, the money had not in fact reached her, so that in a liberal construction it might be said that the pension was still in the course of transmission; but we cannot agree with all that is said in the opinion. The section as we understand it, simply protects pension money in transit; and here the facts are that the transit was ended, the drafts had been sold and the bank was a debtor in the balance of a general account to the defendant, and hence the bank was liable as garnishee. See the case of *Kellogg v. Waite*, 12 Allen, 529, in which the Supreme Court of Massachusetts, while not deciding the question before us, uses language impliedly sustaining the views we have expressed. See also *Webb v. Holt*, Iowa Supreme Court, March 24, 1882.

The judgment of the District Court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

Judgment reversed.

All the justices concurring.

NOTE BY THE REPORTER.—In *Webb v. Holt*, 57 Iowa, 713, where a pensioner received his pension in the form of a draft, drew the money on the draft and deposited the same in a bank to his credit, it was not exempt, in the hands of the bank, from the process of attachment for the pensioner's debts. The court said: "The defendants claim that the money in question is exempt from attachment under section 4747 of the Revised Statutes of the United States, which is as follows: 'No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer, or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner.'

"The appellants cite and rely upon *Eckert v. McKee*, 9 Bush, 355; *Haywood v. Clark*, 58 Vt. 612, and *Fulchow v. Werner*, 51 Wis. 85. In *Haywood v. Clark*, the defendant received a check or draft from the United States pension agent, and gave it to his wife, who by his advice passed it to one Pierpont, and took his note therefor. A creditor sought to charge Pierpont as a trustee of the defendant. The court held that while the check or draft from the pension office was the form of the defendant's claim, and while that constituted the

matter of credit in the sense of the trustee law of the State, it, or the value represented by it, could not be reached by any creditor by any process or proceeding ; that the defendant had the right to give the draft to his wife, and the legal title passed to her by gift ; that the only ground upon which Pierpont could be charged as for a debt due from him, on the score of the draft, was the note given to the wife, and that upon the facts shown the note did not render him liable as on a note payable and delivered to the husband. It is evident that this holding determined the case, and perhaps correctly, for it may well be decided that until the original draft through which the money is transmitted is cashed, the money, in the language of the statute, ' is in course of transmission to the pensioner,' and that he might then, without any fraud upon his creditors, give it to his wife. The court however went further, and declared what it would feel it to be its duty to hold in order to protect the pension from process, did the case require it. What is further said in the opinion, it appears to us, can be regarded only as *dictum*.

"In the case of *Eckert v. McKee*, Adams, the pension agent at Lexington, drew his check on the United States assistant treasurer, for a pension due to Mrs. M. H. McKee. The check was payable to the order of Mrs. McKee. On the same day, one J. T. Vanorsdale brought the check with the name of Mrs. McKee indorsed thereon to the office of the pension agent, who went with Vanorsdale to a bank, and introduced him, when the money was paid to him. The creditors of Mrs. McKee sought to subject a part of the money to the payment of their debts. It does not appear from the statement of facts, whether the money had ever in fact come into the possession of Mrs. McKee, or was still in the hands of Vanorsdale. The court, without citation of authority or reasoning to support the determination, concluded that the fund was not liable to attachment. If the money had not come into Mrs. McKee's possession, it might be regarded as in course of transmission, and hence as coming under the protection of the statute. The case of *Folschow v. Werner* is the only one in which it distinctly appears from the facts that the question of exemption, after payment to the pensioner, was involved. In that case it was held that the pension money was exempt from liability for the pensioner's debts. In the opinion the case of *Eckert v. McKee* is cited and relied upon. The reasoning of the court is not, to our minds, satisfactory. Upon the other hand, the appellee cited and relied upon *Kellogg v. Waite*, 12 Allen, 529, and *Spelman v. Aldrich*, 128 Mass. 118. In *Kellogg v. Waite* the money had been paid to the agent of the pensioner before the statute in question was enacted, and the court held that it could not be controlled by it. In *Spelman v. Aldrich*, the court, without any reasoning, and relying solely upon *Kellogg v. Waite*, held that even if, under the statute in question, the pension was exempt while it remained in the form of a pension check, the exemption certainly ceased after the money was drawn upon the check. The question resting in so unsatisfactory a situation, upon authority, we feel at liberty to determine it wholly upon principle. The section, by its direct terms, is limited to money in two conditions, money due to a pensioner, and money to become due to a pensioner. The pension is a fixed amount of money payable at stated periods. When the period for payment has elapsed, the money is due ; before such period has elapsed, the money is to become due. When the money has actually come into the hands of the pensioner, it ceases to be money due, or to become due, and then, it seems to us, the statute ceases to apply to it. It is said however that the statute provides that the money shall inure wholly to the benefit of the pensioner. In our opinion it does inure wholly to the benefit of the pensioner, when it comes into his possession, and becomes subject to his control, under the laws of the State, in the same manner as other property owned by him. The provision of the statute, ' whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto,' cannot be ignored in placing a construction upon the statute. This it seems to us imposes a limitation upon a provision which would otherwise be general, and determines the peculiar situation in which money due, or to become due, shall be exempt from seizure. The enumeration of particulars implies a negation of the general. If the statute exempts money paid to a pensioner, even after it comes into his hands, the particular enumeration of conditions under which the money would be exempt becomes unnecessary and unmeaning, and might as well be eliminated from the statute. In our opinion, the purpose of the statute is to render it certain that the government's bounty shall come into the hands of its beneficiary, and shall not be seized

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for its debts before it reaches him. If it had been the intention to impress upon it a different character, after it comes into the hands of the pensioner, from other property owned by him, it seems to us that that intention would have been expressed in a manner more certain and direct. Indeed it may well be doubtful, whether the ordinary incidents of property which has vested in a citizen of a State can be controlled or modified by Federal legislation."

ROTHROCK and BECK, dissented.

In *Fulchow v. Werner*, *supra*, "We are entirely satisfied that the learned Circuit judge interpreted the statute correctly. The subject matter of the statute is pension money, and its purpose and object is to protect the pensioner in the personal enjoyment of the bounty of the government. The exemption is absolute in its terms. The money shall not 'be liable to attachment, levy or seizure by or under any legal or equitable process whatever, * * * but shall inure wholly to the benefit of such pensioner.' And as an additional safeguard for the protection of the pensioner, and the more effectually and certainly to secure the object of the statute, the exemption was made to cover and protect the money while still in the pension office, and when in the course of transmission to the pensioner. The words 'due, or to become due,' in the statute, were doubtless employed to render it certain that the benefit of the statutory exemption was intended for pensioners to whom pensions had already been granted, as well as for those to whom pensions should be granted after the statute was enacted.

"Manifestly none of the above provisions of the statute were intended as limitations upon the right of exemption thereby conferred, but rather as extensions of it. The plain meaning of the statute is, that the specific money received by the pensioner from the government in payment of a pension granted to him cannot be reached by a creditor and applied to the payment of the debt of the pensioner by any judicial process. To sustain this construction it is not necessary to resort to the rule which prevails in this State, that exemption laws are to be liberally construed in favor of the debtor. *Krueger v. Pierce*, 37 Wis. 269.

"The only cases cited in which the statute (section 4747) has been considered, are *Eckert v. McKee*, 9 Bush, 355, and *Kellogg v. Barton*, 12 Allen, 527. The first of these cases fully sustains our views of the statute. In the latter case, although there are some expressions in the opinion opposed to our views, it was held that the statute was not applicable because the money had been paid to the agent of the pensioner before it was enacted.

"The remaining cases (all from New England) cited in the brief of counsel for plaintiff, have but little bearing on the question under consideration. Moreover, it must be remembered that those cases were decided by courts which in the construction of exemption laws hold a strict rule against the debtor. Hence those cases afford but little aid in the construction of that class of laws by this court. *Watkins v. Blatschinski*, 40 Wis. 347."

In *Jardain v. Fairton Saving Fund Association*, 44 N. J. 876 (Sup. Ct.), the pension draft had been transmitted to the pensioner, and he had indorsed it and delivered it to a bank, and received part of it in cash, and left the balance on deposit to his credit to be checked out. The court said: "Under this legal provision it is contended on behalf of the prosecutor that funds so proceeding are to be held sacred and protected from creditors, even in the hands of the beneficiary, so long as they can be identified. But, obviously, I think such a purpose is outside of the scope of the legislative intention. The fund is not placed in his hands as a trust, but it is, in the language of the act, to inure wholly to the benefit of the pensioner, and the section quoted does no more than to protect it and prevent interference in any way while it is in the custody of the United States, or any of its officers or agents appointed for its distribution, or while it is in the course of transmission from them to the party entitled to receive it. The money would probably have this immunity from the claim of creditors, irrespective of the act mentioned. *Buchanan v. Alexander*, 4 How. 20; *Elwin's Appeal*, 67 Penn. St. 267, and cases there cited. When it comes to him in hand or personal control, it is his money as effectually and for all purposes as the proceeds of his work and labor would be, and whether he expends it in new contracts, or it be taken to pay the consideration due from him for those of the past, it equally enures to his benefit."

SHERMAN V. ANDERSON.

(27 Kans. 333.)

Negligence — stock running on unfenced railway — injury to fireman.

A railroad fireman was killed by collision of the engine with a steer straying on the track. The railway company owned the right of way in fee simple; the owner of the steer owned the land adjoining on both sides; the railway was unfenced; and the owner of the steer was in the habit of turning his cattle loose on his land. There was no statutory duty to fence. *Held*, that there was no cause of action against the owner of the steer.

ACTION for death of the plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

Nelson Cobb, for plaintiff in error.

A. W. Benson, for defendant in error.

BREWER, J. This was an action brought under section 422 of the Code of Civil Procedure. Petition, answer and reply were duly filed, and the case went to trial. After the plaintiff had finished his testimony, a demurrer to the evidence was sustained, judgment entered for defendant; and to reverse this ruling plaintiff in error comes to this court.

The facts are these: Plaintiff's intestate was a fireman, employed on the L. L. & G. railroad, and while engaged in running a freight train, the train struck a steer belonging to defendant, the engine and tender were thrown from track, and plaintiff's intestate so injured that he died. The right of way at the place of the injury was owned in fee simple by the railroad company, which had obtained a deed therefor from the defendant. The latter owned the land on both sides of the right of way; the railroad was unfenced; defendant was in the habit of turning his cattle loose on his own lands, and they frequently strayed on and across the railroad track. The learned counsel for plaintiff thus states the question: "The question presented is, whether one owning land on each side of a railroad, owned in fee simple, and occupied by a railroad company in the transportation by steam power of freight and passengers (the railroad not being fenced), may depasture his land, and with it the land of the railroad company, without liability

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to persons lawfully upon the trains, for injuries produced by collisions between the cattle and the trains, and without allowing the jury to pass upon the question of defendant's negligence or wrongful omission."

The question is a new one, in this State at least, and of no small importance. The statement presented by counsel presents the question in as fully a favorable light for the plaintiff as the facts will warrant. It may be remarked that it is not pretended that defendant drove his cattle upon the track, or was guilty of wrong or negligence in any other way than in permitting his cattle to roam at large, and in failing to fence between his land and the railroad track. Neither is it pretended that the employees in charge of the train, plaintiff's intestate included, were any of them guilty of actual negligence in the handling of the train. The accident was unavoidable save by previous fencing of the track, or other means to keep the cattle off from it. Under these circumstances, was the defendant liable for the accident, or was there a question which ought to have been submitted to a jury? The argument of plaintiff in error is substantially this, that defendant's cattle were trespassers on the railroad track (*Railway Co. v. Rollins*, 5 Kans. 168), and that plaintiff's intestate was rightfully on the train and under no obligation to defendant or any one else in respect to fencing; that no statute of this State in terms commands either a land-owner or a railroad company to fence; that as to railroads the statute simply imposes a liability of paying for stock in case the company has not fenced its track (Compiled Laws, 1879, p. 784, § 30; *Railroad Co. v. Mower*, 16 Kans. 573); that as to the land-owner, a failure to fence debars him from the right of recovery for damages to his crops by trespassing cattle (*Larkin v. Taylor*, 5 Kans. 433); and that these penalties and restrictions are the express and sole limit of liability; that independent of all statutory provisions there is an obligation upon both the railroad company and the land-owner to fence whenever so doing is necessary for public safety; and that while the railroad company may have been guilty of negligence in not fencing so as to keep cattle off its track at the place of this injury, the defendant was also guilty of negligence in permitting his cattle to roam at large adjacent to and upon the track of the railroad company, and that while the railroad company by reason of its negligence might not be able to maintain any action against the defendant, the plaintiff, whose intestate was

guilty of no wrong and free from all negligence, may maintain this action against the defendant on account of his negligence.

We do not think this argument sound. The fencing of a railroad track is a duty required not merely for the protection of cattle, but for the protection of the lives and safety of persons on railroad trains, whether employees or passengers. The enforcement of this duty is the exercise of the police power of the State, and it may be cast by the legislature upon either the land-owner or the railroad company, as it shall deem best. There is especial justice in casting this duty upon the railroad company, inasmuch as it chiefly profits by the use of the railroad track, and those rapid means of transportation whose very rapidity makes the presence of cattle on the track so dangerous to life and limb; and such we understand to be the purpose and scope of the statute of 1874, chapter 94. So far as the statute respecting partition fences is concerned (if it ever had any application to the fencing of a railroad track, and as to that we express no opinion), it was superseded by this statute of 1874; and from that time on, the duty of fencing so as to keep cattle off from the track was a duty enjoined solely upon the company. Counsel refers in his brief to the peculiar phraseology of that statute, in this that it imposes no express command on the railroad company, but declares substantially that it must pay for cattle unless it has fenced its road. We had occasion to notice this peculiarity of the statute when first before us for consideration in the case of *Railroad Company v. Mower, supra*, and in that opinion referred to the statutes of other States in which a similar form of legislation had been adopted. Notwithstanding this peculiarity, it seems clear to us, that as between the land-owner and the railroad company, the duty of fencing, so as to keep cattle off the track is cast exclusively upon the railroad company. Unlike the case of the *Central Branch R. R. Co. v. Lea*, 20 Kans. 353, the land-owner in this case violated no statute in suffering his cattle to go at large. Whatever risk of liability he might run to the owners of fields properly fenced, or to a railroad company whose track was properly fenced, for any depredations or injury done by his cattle, the owner of an unfenced field and a railroad company with an unfenced track were not in a position to challenge his conduct. The law had imposed upon them a duty which they must perform before they were in a position to complain of this action. Counsel does not seriously contend, but rather concedes, that the railroad com-

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pany could maintain no action against him ; but in how much better position is the plaintiff ? His intestate was not a passenger, but an employee of the railroad company, and if the employer could maintain no action by reason of his own negligence, can the employee, while engaged in his master's business, assert a superior right ? The case nearest in point which we have been able to find, or to which we have been referred by counsel, is that of *Child v. Hearn*, L. R., 9 Exch. 176. In that case, the facts were that the plaintiff, a plate-layer in the employ of a railway company, was returning from his work along its line upon a trolley propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, upon the line in front of the trolley, and the trolley ran over the pigs and was upset, and the plaintiff was injured. The fence was insufficient, and it was the duty of the railway company to maintain the fence, and it was held that the plaintiff could not maintain an action. BRAMWELL, baron, in delivering the opinion, uses this language :

“ The pigs then got upon the line through an insufficient fence, and caused injury to the plaintiff ; and the question arises, is the defendant liable ? What might happen if one of the public were injured in the use of the railway, which is a public highway, I will not say. The defendant might perhaps say : ‘ I was not bound to fence ; ’ but then the plaintiff might reply : ‘ There was an opening through which you knew the pigs might get out of your field upon the line ; you allowed them to be in the field, and I, using the road innocently, suffered injury through their escaping upon the line. ’ But however that might be, here the plaintiff was a servant of the owner of property which was unfenced through the owner's default. It is manifest, as I have before said, that if the pigs got upon that unfenced property through its owner's default, the owner could not maintain an action ; and if so, it is impossible to say that a third person, using the property through the license of the owner and on his behalf, can. The servant can be in no better position than the master when he is using the master's property for the master's purposes. Therefore without saying any thing as to the decision in *Thorogood v. Bryan*, it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant. ”

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So here whatever rights a passenger might have under circumstances like those in the present case, we think the plaintiff, whose intestate was an employee engaged at the time in the management of the train, can have no rights superior to those of the railroad company. Therefore it follows that the ruling of the District Court was correct, and there was no question of negligence on the part of the defendant to be submitted to the jury, and the judgment must be affirmed.

Judgment affirmed.

All the justices concurring.

STATE V. CLAYTON.

(27 Kans. 442.)

Office and officer — resignation — when takes effect.

The resignation of a public office does not take effect until acceptance or something equivalent.*

ACTION to test title to office. The opinion states the case.

Maher & Osmond and Nimocks & Diffenbacher, for relator.

W. H. Rossington and C. B. Smith, for defendant.

BREWER, J. This is an original case in this court, brought for the purpose of testing the title of defendant to the office of Probate judge of Barton county. To the petition defendant has interposed a demurrer, and the case is now submitted to us upon such demurrer. The facts as alleged in the petition, and admitted by the demurrer, are as follows: In 1880, one E. L. Chapman was duly elected and qualified as Probate judge of Barton county. On the 3d day of October, 1881, he wrote and forwarded to the governor an unconditional resignation of such office. Such resignation reached the governor's office on October 4, and the governor's hands, October

* See U. S. v. Justices of Lauderdale, 10 Fed. Rep. 460.

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8, and on the same day the governor wrote to Judge Chapman : “ Your resignation has just been received, and is hereby accepted, and to take effect on appointment of your successor.”

This letter was received by Judge Chapman on the 9th of October. About the first of November, 1881, the defendant was appointed by the governor Probate judge, and immediately qualified and entered upon the duties of the office. Prior to the November election of 1881, each of the three political parties in Barton county made a nomination of Probate judge. The sheriff in his proclamation of election notified the electors that a Probate judge was to be elected, and nearly every one who voted at that election voted for one or the other of the candidates. The relator received a majority of the votes cast at that election, received a certificate of election, and qualified in due time. He then demanded possession of the office from the defendant, who refused to surrender, claiming that he was entitled to hold the office during the year 1882. Thereupon this action was commenced. The election in November, 1881, was held on the 8th day of November. Intermediate the 9th of October and the time the defendant qualified and entered upon the duties of his office, Judge Chapman, as Probate judge, performed several official acts, but in affixing his signature he did so in this form : “ E. L. Chapman, acting Probate judge.” The relator had been, prior to the election, a justice of the peace, but did not act as such officer from and after the day of the election ; and on the 24th day of November he forwarded his resignation to the governor, which resignation was accepted, and a successor appointed and duly qualified. The case therefore turns upon this question: When did the vacancy occur in the office by the resignation of Judge Chapman ? Section 11, article 3, Constitution of the State, contains this language: “ In case of vacancy in any judicial office, it shall be filled by appointment of the governor, until the next regular election which shall occur more than thirty days after such vacancy shall have happened.”

Section 12 reads : “ All judicial officers shall hold their offices until their successors shall have qualified.”

Now it is claimed by plaintiff that Judge Chapman's resignation took effect October 3, because upon that day an absolute and unconditional resignation was by him transmitted to the governor, the officer entitled to receive it ; and this upon the theory that the incumbent of a public office has an absolute right to lay aside its du-

ties and resign the office at any time, and that no acceptance of such resignation is necessary. Plaintiff further contends that if there be any doubt as to this, the resignation was complete and took effect on October 8, the day it was received and acknowledged by the governor. On the other hand it is contended by the defendant that acceptance, or something equivalent thereto, is necessary to perfect a resignation; that a party who has once accepted an office and entered upon its duties has not the absolute right at his own pleasure to abandon its duties and resign the office; that the public are interested as well as the individual incumbent; and that as acceptance or its equivalent is necessary to perfect a resignation, when the acceptance specifies the time at which it will take effect, until such time the resignation is not complete. The law as stated by the defendant is correct. The public have the right to command the services of any citizen in any official position which they may designate; and he may not, after entering upon the duties of the position, abandon them at his option. It is true that this, as a practical question will seldom arise, and is of little moment; for in this country there are so many willing and eager to serve the public in official positions that the difficulty will always be to find offices for the aspirants rather than to find incumbents for the offices. Still, emergencies may arise in which the absolute and superior right of the public must be recognized. In times of peace the ranks of the army are supplied by voluntary enlistment, but in times of war and great national danger compulsory military service may be and has been required. So also service as a juror, who is a *quasi* officer, is compulsory, and the individual citizen may not decline at his pleasure. So a party elected or appointed to any township office, who shall refuse or neglect to serve therein, unless unable from disease or other infirmity to discharge its duties, is liable to a fine of \$25. Comp. Laws of 1879, p. 985, § 46. It is true there are some authorities in this country which seem to recognize the absolute right of the office-holder to resign his office, and hold that the resignation is complete without acceptance. These authorities are collected by plaintiff in his brief, and are *United States v. Wright*, 1 McLean, 509; *People v. Porter*, 6 Cal. 26; *State v. Clark*, 3 Nev. 566; *State v. Fitts*, 49 Ala. 402; *Gates v. Delaware*, 12 Iowa, 405. See also *Bunting v. Willis*, 27 Gratt. 144.

The opposite view is however recognized in other States, as will appear from the following authorities. *Hoke v. Henderson*, 4 Dev.

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(N. C.) L. 1 (25 Am. Dec. 677) ; *Van Orsdall v. Hazard*, 3 Hill, 243 ; *State v. Ferguson*, 31 N. J. 107. In the case from North Carolina, *supra*, Chief Justice RUFFIN, in speaking for the court, said :

“ An officer may certainly resign, but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted ; and that has been so much a matter of course with respect to lucrative offices as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military ; hence there are on our statute book several acts to compel men to serve in offices. Every man is obliged upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he cannot lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged.”

See also the case of *London v. Headen*, 76 N. C. 72.

This question has recently been examined by the Supreme Court of the United States, in a case which arose in the State of Michigan (*Edwards v. United States*, 103 U. S. 471), in which the question is examined and authorities reviewed at some length by Mr. Justice BRADLEY, and the conclusion of the court is unanimous that where the common law obtains, and in the absence of express statute, acceptance is necessary to perfect a resignation. In this case, citing the English authorities, he shows that the unquestioned rule of the common law was in accordance with the conclusion reached by the court. In our own State, by express statute (Comp. Laws 1879, p. 1013, § 3), “ the common law, as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes of this State.” See also *Railway Co. v. Nichols*, 9 Kans. 252. So far as any special provisions of our statutes are concerned, they suggest no departure from the common-law doctrine, and are very like the provisions of the Michigan statutes which are referred to and considered by the Supreme Court of the United States in the opinion just cited. It follows from these considerations, that the resignation forwarded by Judge CHAPMAN did not take effect

absolutely at the time it was forwarded, but required acceptance on the part of the governor, and this acceptance being to take effect upon the appointment of a successor, the vacancy was not absolute until such appointment was made. The demurrer must therefore be sustained, and judgment entered for the defendant.

Judgment accordingly.

All the justices concurring.

JENKINS V. MCNALL.

(37 Kans. 532.)

Execution — exemption — double — "implement."

▲ printer's printing-press is exempt from execution as an implement of trade. But a printer, who is also a money-lending agent, cannot exempt his press unless he derives his principal support from printing.

REPLEVIN. The opinion states the case. The defendant had judgment below.

A. M. Corn, for plaintiff in error.

Webb McNall, for defendant in error.

HORTON, C. J. This was action of replevin for one Gordon job-printing press, brought by Will. D. Jenkins, as plaintiff, against C. E. McNall, as defendant. The case was tried by the court without the intervention of a jury. The court rendered a judgment for the defendant, to which plaintiff excepted.

The question in the case is, whether the printing press was exempt to the plaintiff. Sec. 3, ch. 38, p. 437, Comp. Laws of 1879, provides:

"Every person residing in this State and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this State, the following articles or personal property * * * 8th. The necessary tools or implements of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business * * *

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If this case under the findings of the court, came within the provisions of this statute we would hold that the printing-press was exempt from seizure and sale. Notwithstanding the opinion in *Buckingham v. Billings*, 13 Mass. 82, and *Danforth v. Woodward*, 10 Pick. 423 (20 Am. Dec. 531), we know of no good reason upon a liberal interpretation of our exemption laws, why such a printing-press should not be exempt. The exemption laws are to be liberally construed, so as to effect the humane purpose of the legislature in enacting them; and it would seem to us that a job-printing press, used and kept by a person for the purpose of carrying on his trade or business as a job-printer, might be as much a necessary tool or implement of such a person as an axe to a carpenter, or an anvil to a blacksmith. It will not do to confine "tools and implements" to such implements only as are used by the hand of one man. *Bequillard v. Bartlett*, 19 Kans. 382; s. c., 27 Am. Rep. 120; *Voorhees v. Patterson*, 20 Kans. 555; *Patten v. Smith*, 4 Conn. 450 (10 Am. Dec. 166); *Lallee v. Waters*, 17 Ala. 482. But the findings of the court do not clearly bring the plaintiff within the terms of the statute, so that the printing-press in this case was exempt from execution. It appears from the findings that at the date of the levy the plaintiff was engaged in editing a newspaper, running a job-printing office, and also acting as an agent for the loaning of money. It is not shown that the running of the job-printing office was his principal or main business. The findings show that the plaintiff only depended on his printing-office in part for the support of himself and family. In answer to an inquiry whether the use of the printing-press was necessary to the plaintiff in the successful prosecution of his trade or business, the court answered that it was as to the branch of job-printing. A person cannot by multiplying his employments, claim cumulatively several exemptions, created by the statute for several distinct employments. Thus one person cannot claim the exemption of his library and office furniture as a professional man, and at the same time ask to have exempted to him tools and implements for the purpose of carrying on his trade or business as a mechanic or miner. The mere fact however that a debtor carries on two or more trades or professions at the same time does not deprive him of all exemptions. If he has two separate pursuits, the exempted articles must belong to his main or principal business. In other words, to the business in which he is principally engaged. Comp. Laws 1879, ch. 38, p. 437; *Bevitt v. Crandall*, 19 Wis. 581; *Gup-*

til v. McFee, 9 Kans. 30; *Thomp. on Exemp.*, § 758. Under the findings, for aught that appears, the plaintiff may have derived his principal support from editing a newspaper or from his business as a loan agent. At least there is no finding that the property levied upon was necessary for the purpose of carrying on any trade or business from which the plaintiff derived his principal support; nor is there any finding that the business of job-printing was the principal or main business of plaintiff. The judgment of the court was against the plaintiff, and all the presumptions are in favor of the judgment, unless the special findings of the court are inconsistent therewith. If the special findings can be construed in harmony with the general finding, such construction must be given. We think this can clearly be done. As the court decided the property not exempt, and as it does not appear from the special findings that the plaintiff derived his principal support from his business of job-printing, and as it does appear from such findings that he was engaged in several employments or pursuits, we cannot hold under the circumstances of the case, against the judgment, that the property described in the petition was exempt to the plaintiff. Therefore the judgment of the District Court will be affirmed.

Judgment affirmed.

All the justices concurring.

STATE V. JACKSON.

(97 Kans. 581.)

Jury — disqualification — when objection must be raised.

The objection that a juror was not an elector must be raised before verdict, even in a capital case, it not being an absolute disqualification but only ground of challenge.

CONVICTION of murder. The opinion states case.

Sluss & Hatton, for appellant.

Charles Willsie and *J. W. Haughey*, for State.

State v. Jackson.

VALENTINE, J. This was a criminal prosecution for murder in the first degree. The defendant was convicted and sentenced and he now appeals to this court. Only two questions are presented to this court: First it is claimed that the information upon which the defendant was prosecuted does not state facts sufficient to constitute the offense of murder in the first degree ; second, it is claimed that two incompetent jurors, along with ten other jurors, were allowed to hear and determine the case.

[Omitting the first question.]

The next question is seemingly more difficult, for there are authorities which seem to sustain the position for which counsel for the defendant contend, though we think the weight of authority is on the other side. Two of the jurors who found and rendered the verdict in this case had, during the war of the rebellion, voluntarily borne arms against the government of the United States, and their consequent disabilities have never been removed. It is clear therefore that these two jurors are not electors of the State of Kansas ; and for that reason, inferentially, they are not proper persons to serve as jurors. There is no provision however of either the Constitution or the statutes, that in terms makes such persons incompetent to serve as jurors ; but the statutes with reference to the qualifications of jurors would seem, inferentially, to authorize only electors to serve in such capacity. These two persons were competent in every respect to serve as jurors in this case, except that they were not electors of the State of Kansas. We would think that if any objection had been made to these two persons serving as jurors at any time before the jury were impanelled and sworn, that the objection should have been sustained, and these two jurors discharged ; but no such objection was made. It would seem that neither of the parties nor their counsel had any knowledge before the trial that these two persons were not electors, or that they were not competent to serve as jurors. And indeed it would seem that neither the parties nor their counsel made any effort to ascertain these facts. From any thing appearing in the case up to the time when the defendant made his motion for a new trial, and in arrest of judgment, it would seem that both parties and their counsel were entirely willing that these two persons should serve as jurors, whether they were legally competent to serve or not. After the trial was completed, and after the defendant was found guilty, as charged in the information, he made a motion for a new trial,

and also a motion in arrest of judgment, upon the ground, among others, that these two jurors were not competent to act as jurors; and upon these two motions the question of their competency was for the first time raised in the trial court.

We think the question was raised too late. We think the defendant, by waiting until after the verdict was rendered before he attempted to raise the question, waived all right which he otherwise would have had to raise any such question. The mere fact of not being an elector is not an absolute and positive disqualification of a person to serve as a juror. It is simply a ground for challenging him before the jury are impanelled and sworn; and if the parties at the time of impanelling the jury choose to waive their right to challenge for that cause, they cannot complain afterward; and where the parties, as in this case, make no effort to ascertain whether a juror is an elector or not, and if it should afterward be ascertained, as in this case, that he was not an elector, the parties will not be allowed to say that they had no knowledge that he was not an elector. By failing to attempt to ascertain the fact before the jury are impanelled, they waive all right to make any complaint upon that ground afterward. That parties may waive the incompetency of jurors has been settled by numerous authorities, and in every class of cases. It has been so settled in civil cases, where the parties knew at the time of the impanelling of the jury that the juror was incompetent. *Glover v. Woolsey*, Dudley, 85; *Pittsfield v. Barnstead*, 40 N. H. 478; *Selleck v. Sugar Hollow Turnpike Co.*, 13 Conn. 453, 459; *Quinebaug Bk. v. Leavens*, 20 id. 89; *Groton v. Hurlburt*, 22 id. 193 to 195; *Andrews v. Wheaton*, 23 id. 117; *Wallace v. Columbia*, 48 Me. 436; *Fox v. Hazelton*, 10 Pick. 275.

It has also been held that the right to object because of the incompetency of a juror may be waived in civil cases, even where the parties do not know of such incompetency until after the trial. *Amherst v. Hadley*, 1 Pick. 38; *Jeffries v. Randall*, 14 Mass. 205; *Daniel v. Guy*, 23 Ark. 51.

And in criminal cases, even in prosecutions for murder, where the facts are known, an objection to the competency of a juror comes too late, if it is made after verdict. See the following capital cases: *People v. Coffman*, 24 Cal. 230; *Lisle v. State*, 6 Mo. 426; *Keener v. State*, 18 Ga. 194.

It has also been held in criminal cases, where the parties did not

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know the facts, that an objection to the competency of a juror must be made before the verdict is rendered, or it will be too late. *The King v. Sutton*, 8 B. & C. 417; *Gillespie v. State*, 8 Yerg. 507 (27 Am. Dec. 137).

And the same rule seems to apply in capital cases as in others. *Chase v. People*, 40 Ill. 352; *Costly v. State*, 19 Ga. 614, 628; *State v. Bunger*, 14 La. Ann. 465; *State v. Patrick*, 3 Jones (N. C.) 443; *State v. Bone*, 7 id. 121.

See also in this connection, *Montgomery v. State*, 3 Kans. 268. This was a criminal case, though not a capital case.

The principal authorities upon the other side are as follows: *State v. Babcock*, 1 Conn. 401; *Guykowski v. People*, 2 Ill. 476; *Schumaker v. State*, 5 Wis. 324; *State v. Groome*, 10 Iowa, 309; *Rice v. State*, 16 Ind. 299; *Hill v. People*, 16 Mich. 351.

The case of *State v. Babcock*, 1 Conn. 401, has been virtually overruled by the later Connecticut decisions above referred to. And the case of *Guykowski v. People*, 2 Ill. 476, has been actually overruled by the later Illinois decision above referred to. In the case of *The King v. Sutton*, 8 B. & C. 417, it is held that "alienage is a ground of challenge to a juror, and if the party has an opportunity of making his challenge and neglects it, he cannot afterward make the objection." In the case of *Chase v. People*, 40 Ill. 352, it is held that "alienage in a juror is not a positive disqualification—it simply enables him to excuse himself if he chooses to claim the exemption, or it is a ground of challenge and nothing more." In the case of *Costly v. State*, 19 Ga. 614, it is held that "non-residence of a juror being but a cause of challenge *propter defectum*, can and consequently must be made by the prisoner before the juror is sworn, and it makes no difference whether such want of qualification was known or unknown at the time the juror was sworn." In the case of *State v. Bunger*, 14 La. Ann. 465, it is held that "where a juror can be challenged for cause, the right must be exercised before the juror is sworn, and a verdict cures the defect."

In the case of *State v. Patrick*, 3 Jones (N. C.) 423, it is held that it is "too late after a juror has been taken and accepted by the prisoner, and has served on the trial to except to him for incompetency." In the case of *State v. Bone*, 7 Jones (N. C.) 121, it is held that "the prisoner has no right to postpone showing cause of challenge to a juror and have him stand aside until the panel is finished."

The last five cases cited are all capital cases, and the case cited from Barnewall & Cresswell was an indictment for a conspiracy. In the case of *Gillespie v. State*, 8 Yerg. 507, it is held that "it is no ground for a new trial in a criminal case, that one of the jurors trying the issue was one of the grand jury who found the bill of indictment. The objection to the juror must be made by challenge before he is sworn or it is waived."

As before stated, the fact that said two jurors were not electors was not a positive and absolute disqualification to them to serve as jurors, but only a ground for challenge. If it were a positive disqualification, then the trial would have been a nullity — precisely the same as though it had been had before ten men only; and if the verdict had been in favor of the defendant, the State might have treated the verdict as no verdict, and put the defendant upon trial again for the offense charged against him. We suppose that no one will claim that this could be done. The fact that said two jurors were not electors could not have prejudiced any of the substantial rights of the defendant. Undoubtedly they tried the case as fairly and impartially as though they had been electors. If the disqualification of the jurors had been such as would have prejudiced any of the substantial rights of the defendant it might be the defendant would have a right to a new trial because of such disqualification; but where the disqualification does not prejudice any substantial rights, we do not think that any new trial should be granted because of the disqualification. The defendant, by failing to object to the jurors before they were sworn and by failing to attempt to ascertain whether they were electors or not, waived the disqualification, and rendered the jurors competent to hear and determine the case.

The judgment of the court below will be affirmed.

Judgment affirmed.

All the justices concurring.

Lukens v. Freund.

LUKENS v. FREIUND

(37 Kans. 604.)

Sale — implied warranty — bran for cattle.

A farmer bought of a miller a sack of bran for his cows. Before it was removed from the mill two copper clasps accidentally fell into it, without negligence on the miller's part, and one of the cows swallowed them and was killed thereby. The bran was part of a quantity on hand open to inspection. There was no express warranty. *Held*, that the buyer had no remedy against the seller.

ACTION on implied warranty for damages for negligently causing the death of a cow. The opinion states the case. The plaintiff had judgment below.

Hudson & Tufts, for plaintiffs in error.

L. F. Bird and H. M. Jackson, for defendant in error.

BREWER, J. The facts in this case are substantially as follows: The plaintiff is a farmer living near the city of Atchison. Defendants are doing business as millers in the city of Atchison. Plaintiff was in the habit of stopping there and buying bran for the purpose of feeding his stock. On January 31, 1880, in the usual way, he stopped and bought a sack of bran paying therefor forty cents. In the bran were two copper clasps, such as were used about the mill. These clasps were swallowed by one of plaintiff's cows, and lodging one in the paunch and the other in the stomach, poisoned and killed her. Thereupon he brought this action against the millers, and recovered a judgment for the value of the cow; and for the purpose of reviewing the proceedings, defendants bring this case here. It appears from the testimony that the arrangements in the mill were such that the sack was fastened to the end of a spout, through which the bran was discharged into it, and that sometimes some of the bran spilled upon the floor, and was thence gathered up and placed in the sack. How these clasps found their way into the bran is not disclosed by the evidence. The jury in answer to one of the special questions found that defendants were not negligent or careless. Plaintiff claims a right to recover on the ground of an

implied warranty; that the defendants were manufacturers; that they sold the bran, the product of their own manufacture to him, knowing it was to be used in feeding stock, and thereby impliedly warranted that it was fit for such use, and that the same rule applies whether the food be purchased for personal use or the feeding of stock. The amount in controversy in this case is small, yet the principle involved is important.

The unquestioned rule of the common law was *caveat emptor*. As is said by the author in 1 Smith's Leading Cases, p. 242:

"The policy of the common law seems to have been to limit the effect of a sale to the transfer of the right of property from the vendor to the purchaser, and to throw the hazards of the purchase upon the latter, unless he had expressly stipulated that they should be borne by the former. No warranty of quality or value was consequently implied from the sale, either of personal or real estate."

Upon this recognized policy of the common law, there have been repeated efforts to engraft exceptions, and now it may be conceded that a few have become successfully established. Among them may be mentioned these: Where an article is ordered from a manufacturer, to be by him manufactured for a special purpose, of which the manufacturer has knowledge, there is an implied warranty that the article when manufactured shall be reasonably fit for such purpose. *Craver v. Hornburg*, 26 Kans. 94.

Again, where goods are sold by sample, there is an implied warranty that the goods when delivered shall correspond in quality with the sample. *Field v. Kinnear*, 4 Kans. 476; *Bigger v. Bovard*, 20 id. 204. And a third is, where food is sold by a dealer for domestic consumption, there is an implied warranty that it is sound and wholesome. Other exceptions may also exist, but it is unnecessary to mention them.

In this case we have nothing to do with the second exception, but the right to recover is claimed under both the first and the third. It is at least doubtful whether any recovery can be had within the principles of the first exception; for while the defendants were manufacturers, and the bran a product of their own manufacture, yet the contract of purchase was in no respects an executory one; and in respect to the sale of the bran, they occupied the position of dealers, rather than of manufacturers. The disposition as manifested in the authorities is to limit the scope of the first exception to contracts which are in their nature executory, and where the

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agreement is for the manufacture and delivery of some special article, and not where the contract is simply for the purchase of a complete and existing chattel. In Broom's Legal Maxims, p. 614, the rule is thus stated :

“Where an agreement is for a specific chattel in its then state, there is no implied warranty of its fitness or merchantable quality ; but if a person is employed to make a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used.”

In 1 Smith's Lead. Cas., p. 250, the author says :

“The doctrine that a sale made for a particular purpose implies a warranty that the thing sold shall be fit for that purpose, has been advanced on a number of occasions in this country, although seldom made the ground of direct and positive decision. *Brinton v. Davis*, 3 Blackf. 317 ; *Beals v. Olmstead*, 24 Vt. 114. The sounder view seems to be, that no engagement of this sort can be implied against the vendor, save where the contract is partially or wholly executory, and that in this case it is not in the nature of a warranty, but of an implied stipulation, forming part of the substance of the contract.”

See also the cases of *Rogers v. Niles*, 11 Ohio St. 48 ; *Iron Co. v. Groves*, 68 Penn. St. 149 ; *Misner v. Granger*, 4 Gilm. 69 ; *Kerr on Sales*, p. 106 ; *Benjamin on Sales*, §§ 644, and following. After quite a review of the authorities in Smith's Leading Cases, p. 251, the author sums up the result thus :

“On the whole therefore it may be doubted whether there be any instance, in which a knowledge of the object for which a specific chattel is bought will raise an implied warranty that it is fit for that purpose, although a failure to acquaint the vendor with its unfitness may be evidence of fraud, and thus render the vendor liable in an action of tort. *Kingsberry v. Taylor*, 21 Vt. 90 ; *Humphreys v. Comlin*, 8 Blackf. 508 ; *Emerson v. Brigham*, 10 Mass. 407 (6 Am. Dec. 109) ; *Howell v. Cowles*, 6 Gratt. 398 ; *Dickson v. Jordan*, 11 Ired. 166. Thus it was decided in *Dickson v. Jordan*, that the purchase of rope for use in a seine did not give rise to a warranty of its strength, nor make the vendor answerable for its failure to answer the purpose for which it was bought. These decisions are sustained by the recent cases of *Owens v. Dunbar*, 12 Ir. L. R. 304 ; *Dickson v. Zizinia*, 10 C. B. 602 ; and *Burnby v. Bollett*, 16 M. & W. 604 ; which seems to show that the liability of the vendor for

the failure of the thing sold to answer the purpose for which it is purchased, is confined to those instances, where the contract is executory, and does not arise in executed sales of specific chattels."

The reasoning of these cases seems applicable to the case at bar. While the bran was the product of the defendant's manufacture, yet it was not manufactured on any contract with the plaintiff. They had on hand a supply of bran, an article already manufactured, and that article the plaintiff purchased. There is nothing in the dealings between the parties which would seem to raise any other implication than would arise if a like purchase had been made by plaintiff of the same article from a dealer; and unless an implied warranty would be raised by the purchase of bran under like circumstances from a grocer, it would then seem that none ought to be implied in the case at bar. There was no express representation by the plaintiff of the purpose for which he was purchasing the bran; it was not manufactured upon his order, and there were no representations or express warranties on the part of the defendants. They had on hand a manufactured article which they desired to sell, and the plaintiff finding it there, purchased it. It would seem therefore that a recovery could not be sustained under the principles controlling the first exception.

Passing now to the third: and the scope of that exception is limited by the decisions. There is not in every sale of provisions an implied warranty that they are wholesome. Such implied warranty does not exist where one dealer purchases from another. *Moses v. Mead*, 1 Denio, 378; *Wright v. Hart*, 18 Wend. 428; *Ryder v. Neitze*, 21 Minn. 70; *Emerson v. Brigham*, 10 Mass. 197; (6 Am. Dec. 117) and note. It exists only where they are sold for immediate and domestic use, and even then is denied by some authorities. In such cases it seems to be decided upon principles of public policy, that there is an implied warranty that the provisions sold are sound and wholesome. *Van Bracklin v. Fonda*, 12 Johns. 457 (7 Am. Dec. 339); *Hoover v. Peters*, 18 Mich. 51; Benjamin on Sales, §§ 670-71; and the note in 6 Am. Dec., *supra*.

Now the application of this exception to the case at bar is denied. It is said that the principle upon which the exception rests does not apply where the articles sold are not intended for consumption by man, but only for use as food for cattle. No authorities have been found by counsel on either side of this question. We are left therefore to determine it upon general principles. Upon what ground

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is an implied warranty rested in the case of the sale of provisions, which does not exist in the case of a sale of other articles? Obviously it is not upon any property grounds, or because thereby the estate of either party is affected; but for reasons of public policy, for the preservation of life and health, the law deems it wise that he who engages in the business of selling provisions for domestic use should himself examine and know their fitness for such use, and be liable for a lack of such knowledge. One may not place poison where it is likely to be taken by one ignorant of its qualities. Regard for human life compels this. No more may he sell food unfit to be eaten to a man who he knows is buying it to eat. The same reason controls, to wit, regard for life and health. But this, it will be remembered, is an exception to the general rule of the common law, and the exception should not be extended beyond the reach of the reasons upon which it is based.

If the preservation of human life and health be, as we think it is, the foundation of this exception, then it should not be extended to cases in which human life and health are in no wise endangered. Now the claim of the plaintiff is simply of a property loss, that his estate has been diminished, and that alone is his cause of action. His injury is similar to that which he would have sustained if he had purchased from a wagon maker a defective wheel, and thereby his wagon had broken down. No matter of life or health of himself or family is involved. We think therefore that no recovery can be had under the principles of this third exception.

Still further, it may be remarked that bran comes very nearly within the description given by some of the witnesses of it as the mere refuse or offal of the mill. It is true, the jury call it in their verdict a secondary product, resulting from the manufacture of flour. It certainly is not the principal product of the grinding of wheat — not that for which the mill is worked. It is that which is left after the flour has been manufactured. It is no uncommon thing in manufacturing establishments, after the principal product is manufactured, that there remains a refuse which is of some value and which is disposed of by the manufacturer as refuse and for whatever it will bring. Now it would seem to enlarge very broadly the doctrine of implied warranty to extend it to this refuse. It is not that for the manufacture of which the manufacturer engages in business; it is not that to which he devotes his special attention and care; it is always of inferior value. This all parties under-

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stand. They deal upon that basis ; and to hold that the manufacturer warrants the quality of this refuse, would seem to cast an unnecessary burden upon its disposal. See the case of *Holden v. Clancy*, 53 Barb. 590 ; s. c., 41 How. Pr. 1 ; *Wilson v. Dunville*, Irish High Court of Justice Ex. Div., 8 Cent. L. J. 375 ; *Turner v. Mucklow*, 6 L. T. (N. S.) 690.

Still again it will be borne in mind, that as the jury find the defendants guilty of no negligence, and also that these clasps were foreign substances, easily recognizable, which had not been manufactured into or become a part of the bran, but which had accidentally dropped into it, it would seem that the purchaser had the same facilities for examining the bran and detecting the presence of any foreign article that the defendants had. It would be as easy to search through the contents of a sack of bran as to search through the contents of a bin for any extraneous substances. If there had been any minute particles of foreign substances like lead or copper, too small to be noticed upon ordinary examination, which in the process of manufacture had been incorporated into and become a part of the bran, or if the defendants had been guilty of any negligence in the manufacture or handling of this bran, there would be greater justice in holding them responsible. Taking the whole case together, it seems to us that it must be held to be a case of pure accident, a case without negligence on the part of either party, a case in which the doctrine of implied warranty does not exist, and therefore a case in which no recovery can be had.

Entertaining these views, it follows that the judgment must be reversed and the case remanded for a new trial.

Judgment reversed.

HORTON, C. J., concurring.

ELLIS V. LITTLE.

(27 Kans. 707.)

Bank — National — powers of receiver of.

The receiver of a National bank, directed to sell the assets on such terms and in such manner as he deems best for the interest of all concerned, has no power to exchange, barter or trade the assets.

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ACTION on contract. The opinion states the case. The plaintiff had judgment and appealed.

H. G. Ruggles, for plaintiff in error.

Sloss & Halton, for defendant in error.

HORTON, C. J. The principal question in this case is, whether the estate of the bank can be charged with the damages resulting to Ellis, plaintiff in error, from the failure and inability of the receiver of the bank to comply with the terms of the contract executed December 31, 1877. If the receiver exceeded his authority in executing the contract, plaintiff in error was not entitled to recover in the court below, and therefore cannot complain that the trial court erred in the amount for which it rendered judgment in his favor. The act of Congress, as embraced in the United States Revised Statutes of 1873-74, to provide a National currency, etc., and which establishes those associations for the carrying on the business of banking now known as our National banks, provides in section 5234 as follows :

“ On becoming satisfied, as specified in sections 5,226 and 5,227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the directions of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all the real and personal property of such association, on such terms as the court shall direct ; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller, of all his acts and proceedings.”

In accordance with this section, H. B. Cullum was appointed receiver of the bank, October 19, 1876, about fourteen months prior to the execution by him of the contract sued on. On the 9th day of January, 1877, said receiver filed in the District Court of the

United States for the district of Kansas his petition praying for an order of the court authorizing him as such receiver to sell certain real estate, bills receivable, overdrafts and other property that were mentioned and described in a certain schedule marked "Exhibit B," and attached to his petition. Among other things in said schedule B under the head of real estate, were the following: "One-third interest in a flouring mill in Wichita, Sedgwick county, Kansas, (incumbered \$961,) part of J. C. Fraker's transfer, \$3,500." In said schedule there was also mentioned one judgment in favor of the said H. B. Cullum, as receiver of the First National Bank of Wichita, Kansas, rendered in the District Court of the United States in and for the district of Kansas against Thomas & Wheeler, for the sum of \$983.63, with 12 per cent interest, and a judgment on a note of J. Hanson, in the District Court of the United States for the district of Kansas for the sum of \$909.25, with 12 per cent interest; one claim for attorneys' fees in favor of Ruggles & Sterry and against Thomas & Wheeler, for \$100, assigned to said receiver; also a claim for an overdraft against Thomas, Wheeler & Co. in favor of said bank, for the sum of \$56.44. Upon consideration of this petition, the receiver was allowed and permitted by the court "to sell each and every item of personal property and real estate mentioned and described in said schedule B, attached to his petition, on such terms and in such manner as in his judgment may be for the best interests of the creditors and all interested in said bank and its assets." On the 8th day of November, 1876, J. C. Fraker assigned and transferred to Cullum an interest in a judgment rendered in the foreclosure of a mortgage upon real estate in Union county, in the State of Iowa, in his favor, against one William Groesbeck, for the sum of \$5,960, to secure and pay about \$2,300 due the bank upon notes held by it, executed by W. A. Thomas & Co. On November 13, 1876, the receiver bid in the mortgaged premises at sheriff's sale, and on the 28th day of November, 1877, a sheriff's deed was executed to the receiver of the mortgaged premises. The consideration that Ellis agreed to pay to the receiver upon the contract sued on was \$5,500. Two thousand dollars was to be paid and satisfied as follows: Ellis was to procure an assignment from S. B. Thomas and E. A. Ellis to Cullum of \$2,000 in the said judgment rendered in the foreclosure suit in Union county, Iowa, against the said William Groesbeck, in favor of J. C. Fraker, which assign-

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ment of \$2,000 in said judgment the said Cullum agreed to receive as a payment of \$2,000 upon the contract. The balance of the consideration, to wit, \$3,500, was to be paid upon the first day of May, 1878. When S. B. Thomas and E. A. Ellis came to assign their interest in said judgment, it turned out that they owned \$3,462.63 therein, and on the 2d day of January, 1878, they assigned all of their interest in said judgment to Cullum, as receiver of the bank, and he receipted on the contract as follows :

“Received, January 2, 1878, of N. W. Ellis, an assignment of the Iowa judgment, by W. A. Thomas and Samantha B. Thomas, and Emma A. Ellis, amounting to \$3,462.63, it being in full of the \$2,000 payment mentioned within, and the balance, \$1,462.63, to apply in part payment due May 1, 1878.

“H. B. CULLUM,

“*Receiver of the First National Bank of Wichita, Kansas.*”

It does not appear that the Iowa judgment, or the judgment rendered in the District Court of Sedgwick county on May 29, 1877, on the note of W. L. Fraker for \$965.90, was mentioned or referred to in the petition filed by the receiver in the United States District Court; and it is not claimed that any specific order was made by the United States court permitting the receiver to exchange, trade or barter the property of the bank for other or different property. The power conferred upon the receiver by the court authorized him to sell the personal property and real estate described in the schedule attached to his petition filed in the court, on such terms and in such manner as in his judgment was for the best interests of the creditors and all interested in the bank and its assets. This — nothing more. The receiver of a National bank, appointed by the comptroller under the section of the act of Congress quoted, is the agent of the United States, and is limited as to his functions by the object of the receivership and the duties which it involves. High on Receivers, § 360; *Kennedy v. Gibson*, 8 Wall. 498.

Under the order of the court, such receiver may sell the real and personal property of the bank on such terms as the court shall direct, but he cannot sell in the absence of such an order, nor sell upon terms in conflict with the order. As the receiver in this case did not apply for an order to sell or dispose of the judgment on W. L. Fraker's notes, supposed to amount to over \$900, any attempted sale thereof, or any agreement concerning a sale of it, was

in excess of his power as receiver, and therefore not binding upon the estate of the bank. Without the order of the court, the receiver had no authority in his official capacity to buy the Iowa judgment or any interest therein, nor could he under the order of the court permitting him to sell the property of the bank, exchange, trade or barter it for other property. Nor could such receiver charge the estate of the bank by any executory contract of his unless he was authorized so to do by the provisions of the National Banking Act and the order of a court of competent jurisdiction obtained under the terms of said act. No application was made by the receiver to the court for permission to execute an agreement of the character of the one sued upon; therefore in the absence of such an order the estate cannot be charged for damages resulting from the failure or inability of the receiver to convey or deliver property not belonging to the bank, nor for his refusal to comply with covenants which he was without power as the receiver to make. As the power of a receiver of a National bank appointed by the comptroller is limited, a person dealing with him in his official capacity is bound as a matter of law to have knowledge of his authority to act, and if contracts and agreements are entered into with the receiver in excess of his authority as conferred by law, the parties contract at their own peril, and the estate of the bank cannot be charged for the default or inability of a receiver acting outside of his functions as receiver and beyond the duties which it involves.

In answer to the point that the receiver exceeded his powers, and that his action did not bind the estate, counsel for plaintiff refers to several decisions; yet none of these are strictly applicable. *Livingston v. Pettigrew*, 7 Lans. 405, was an action to make a receiver liable personally, on his covenant that certain judgments and claims assigned by him were due and unpaid. The court says:

“But assuming that the covenant in question was void, because the receiver exceeded his powers, and that it did not bind the estate, the question arises whether he thereby rendered himself personally responsible for a breach of it. I am inclined to think that he did not, and that the instrument itself showing that the act was done as a receiver, it cannot under any circumstances be construed as a personal covenant. The party who took the assignment knew all about its contents as they appeared, and it is presumed he knew the law and it is fair to assume he knew also that the covenant was void upon its face. If such was the law, he therefore has no

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valid grounds for claiming he has in any way been misled or deceived."

Applying this doctrine to the case at bar, plaintiff has no cause for complaint. The other decisions are to the effect that corporations have no right to violate their charters, but they have capacity to do so and to be bound by their acts, when a repudiation of such acts would result in a manifest wrong to innocent parties. This principle does not control the acts of a receiver, whose powers are so strictly defined and limited by law as those of a receiver appointed by the comptroller of the currency, so far as to make his estate liable for acts of his in excess of his powers.

The trial court found in favor of the plaintiff in the sum of \$587.70. Upon what theory this judgment was rendered we cannot tell from an examination of the record. As it appears however from the evidence, that the estate of the bank realized about \$500 from the sale of the land in Iowa, obtained under the judgment of foreclosure, we suppose the court thought best, under the circumstances, that the plaintiff should recover back the amount actually realized by the bank, notwithstanding the receiver exceeded his authority in executing the contract. In other words, the court seems to have thought that the estate of the bank ought not to retain the benefits of a contract, executed by the receiver in excess of his power. The defendant takes no exception to this judgment, and under the conclusion reached by us, plaintiff has no reason to complain thereof.

The judgment of the District Court must be affirmed.

Judgment affirmed.

All the justices concurring.

CASES

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

CLODFELTER V. STATE.

(88 N. C. 51.)

Negligence — State not liable for.

The State is not answerable in damages for injuries sustained by a convict in its prison through the negligence of the prison officers. (*See note, p. 443.*)

ACTION of damages for personal injury by negligence. The opinion states the case.

J. B. Batchelor, for plaintiff.

Attorney-General, for State.

SMITH, C. J. The demurrer to the complaint raises the question of the responsibility of the State for the consequences of the misconduct or negligence of its officers and agents. The plaintiff, a convict sentenced to hard labor in the State prison for a series of years, was assigned to work on the Cape Fear and Yadkin Valley railroad, and while engaged in blasting rock by a premature explosion sustained an injury in the loss of both his eyes. The complaint ascribes the explosion to the gross negligence of the supervising manager,

under whose authority and control he was placed, in not supplying water in sufficient quantity to use in the operation and prevent the accident. This is the case made in the complaint, and the liability of the State to make compensation is sustained upon the ground of the coerced labor put upon the plaintiff, and the taking from him all volition in avoiding danger and providing for his own safety.

The constitutional provision which confers jurisdiction upon this court "to hear claims against the State" is confined to such as are legal, and could be enforced if the State, like one of its citizens, was amenable to process, and the decision when made is recommendatory merely.

The only question then presented is, whether the State, in administering the functions of government through its appointed agents and officers, is legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence.

That the doctrine of *respondeat superior* applicable to the relations of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled upon authority and practice to admit of controversy.

"No government," says Mr. Justice MILLER, "has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents." *Gibbons v. United States*, 8 Wall. 269. And Judge STORY declares in his work on Agency, section 319: "The government does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests."

Admitting the general principle, the plaintiff's counsel undertakes to withdraw the present claim from its operation, for that the convict was put to work in constructing a railroad, a private enterprise, and not employed at any public work when the accident occurred, and thus the State has voluntarily assumed the responsibilities of one of its own citizens incurred under like circumstances. We cannot recognize the distinction as affecting the results, nor feel the force of the reasoning by which it is sustained. We do not perceive why, when convicts are employed in quarrying rock for the construction of the penitentiary itself, the rule of liability should be different from that which controls when they are engaged in

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similar work to aid in the building of a railroad or other less public work. They are in both cases under the control and supervision of managers or overseers appointed by the public authorities, and the protection of law.

The substitution of hard labor outside of the walls of the prison when the convict's condition is normal, and he has, in fresh air, pure water and wholesome food, superior advantages over a close confinement, is a humane and ameliorating policy in reference to the convict himself, as well as a more profitable use of his labor for the State and not coming in competition with the trade of private persons, and yet it is the performance of an imposed service for crime and answers all the purposes of punishment for its commission.

We are clearly of the opinion that the State has incurred no legal liability for the negligence imputed to the overseer, and he alone, if any one, is answerable for the consequences of his neglect. The demurrer must therefore be sustained and the action dismissed.

Per Curiam.

Dismissed.

NOTE BY THE REPORTER.—In *Alamango v. Supervisors of Albany County and Mayor and Recorder of Albany*, 25 Hun, 551, the complaint alleged that defendants were authorized by the legislature to establish a county penitentiary, and did so, and appointed its officers and superintendents; and that plaintiff, a convict, was by them negligently and illegally compelled to work at a circular saw, whereby he was injured, etc. *Held*, no cause of action. The court said: "It must be conceded that the defendants, in building and managing the Albany penitentiary, were engaged in a public duty which concerned the administration of criminal justice, and that they were not a corporation but were a mere instrumentality selected by the State. *Lorillard v. Town of Monroe*, 11 N. Y. 303; *Brown v. People*, 75 id. 441, 442. The duty of punishing criminals is inherent in the sovereign power. It may be committed to agencies selected for that purpose, but such agencies, while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity. It is so in the laying out and maintaining of highways, the building of court-houses and school-houses, as well as in the building of jails and places of detention. In the performance of all such duties, it is settled by the unanimous agreement of the courts that these agencies are not liable for neglect or misfeasance, unless the liability is especially imposed by statute.

"It is not necessary to discuss the reason of this rule, for there is no break in the long line of authorities by which it is established. *Russell v. Men of Devon*, 2 T. R. 667; *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332, and cases cited; *Hollenbeck v. Winnebago Co.*, 93 Ill. 143; s. c., 35 Am. Rep. 151; *Kincaid v. Hanlin Co.*, 53 Iowa, 430; s. c., 36 Am. Rep. 336; *Woods v. Colfax Co.*, 10 Neb. 532; *French v. Boston*, 129 Mass. 303.

"There is a class of cases in which the municipal corporation has been held liable for its negligence. Such are *Bailey v. Mayor*, 3 Hill, 531, and *Oliver v. Worcester*, 102 Mass. 490; s. c., 8 Am. Rep. 425. But the liability in those cases was put upon the ground, now well established, that the corporation was doing an act for its own benefit and profit primarily in the management of a franchise voluntarily assumed, and was not in the discharge of a public duty. It is not averred in this complaint that the defendants received pecuniary profit from the work done in the penitentiary; and if it were, we do not think that fact would aid the plaintiff. The liability is not put upon the ground of the profit which may incidentally arise, but upon the nature of the work done, or of the undertaking as done for

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the private advantage or emolument of the municipal corporation. See cases last above cited. The case of *Mersey Docks v. Gibbs*, L. R., 1 H. L. 98, was put by the House of Lords on the ground that the legislature intended to impose upon the Mersey Docks Company the same liability which attached at common law to individual owners of similar works. *Hill v. Boston*, 123 Mass. 368; s. c., 23 Am. Rep. 332, GRAY, C. J."

CITY OF WILMINGTON V. MACKS.

(86 N. C. 88.)

Constitutional law — taxation — of attorneys.

A city may impose a special tax upon lawyers by legislative authority.*

ACTION for occupation tax against a lawyer. The plaintiff's charter authorized such tax. The plaintiff had judgment below.

Stedman & Latimer, for plaintiff.

E. S. Martin, for defendant.

ASHE, J., after stating the case. I was not on the bench when this case was argued in behalf of the defendant, but the case having been duly considered in conference, the court is of the opinion it is not now an open question, the principle involved having been decided in the case of *Holland v. Isler*, 77 N. C. 1.

The plaintiffs in that case were the commissioners of the town of Goldsboro, and the defendants were lawyers and physicians residing in said town. The charter of said corporation empowered the commissioners to tax lawyers, physicians, etc. The plaintiffs under that power given in their charter had assessed a monthly tax upon the defendants, which they resisted.

The court below held that the plaintiffs had the right to impose and collect said tax, and from the judgment rendered the defendants appealed to this court, where the judgment of the Superior Court was affirmed, and READE, J., speaking for the court, said: "The Constitution provides that the general assembly may tax trades, professions, etc. Art. V, § 3. The general assembly has authorized the town of Goldsboro to lay and collect a monthly tax

*To same effect, *Young v. Thomas* (17 Fla. 109), 35 Am. Rep. 93.

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on lawyers and physicians, etc. Private Laws 1866. The defendants are lawyers and physicians in the town of Goldsboro, and the town has laid a tax upon them which they refuse to pay. This would seem to make a clear case against them."

We think this case is decisive of that before us.

There is no error. The judgment is affirmed.

No error.

Judgment affirmed.

ALLEN V. BAKER.

(86 N. C. 91.)

Contract — breach of marriage promise — whether excused by disease.

The defendant failed to fulfill a contract of marriage upon the ground that he was afflicted with a venereal disease which rendered him unfit for the married state. *Held*, that he would be answerable in damages if the disease was contracted subsequently to the time of making the promise, or if before and he knew his infirmity was incurable; but if it was contracted prior to the promise and he had reason to believe it was temporary only, he would be excusable. (*See note, p. 448.*)

ACTION for breach of promise of marriage. The opinion shows the case. The plaintiff had judgment below.

Granger & Bryan, for plaintiff.

W. J. Clarke and Hinsdale & Devereux, for defendant.

RUFFIN, J. In *Shuler v. Millsaps*, 71 N. C. 297, the act of 1868-'69 (Bat. Rev., ch. 45, §§ 113, 114), received a construction by this court, and it was held that by reason of the provisions thereof, an action for a breach of promise of marriage did not abate upon the death of the defendant, but survived as against his personal representative. We feel ourselves bound by that decision, though were it an open question, we are inclined to think we should hold differently, in a case like that and the present one, in which no special damages were laid in the complaint.

As stated by his honor, contracts of this sort differ from ordinary contracts, as for the sale of goods and the like, in which damages are awarded according to some well-settled rule of the courts, and

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when the financial condition of the defendant can have no bearing on the question. About the only instruction that could be given was the general one which his honor did give, to the effect, that all the circumstances of the case and the surroundings of the parties should be fairly considered, and just compensation allowed for the anguish endured by the plaintiff, and the injury inflicted upon her prospects in life. In estimating them, it is proper, according to the great weight of modern authority, that the jury should consider the pecuniary condition of the defendant as some standard by which to measure her disappointment, and the extent of her loss. *Harrison v. Swift*, 13 Allen, 144 ; *Sprague v. Craig*, 51 Ill. 288 ; Sedg. on Dam. (7th ed.) 146. The same authorities are full to the point, that the jury should take into consideration whatever mortification and pain of mind the plaintiff may have suffered, resulting from a refusal of the defendant to fulfill his promise. So that in the judgment of this court, no error was committed with reference either to the testimony admitted or the instructions given to the jury, of which the defendant can rightly complain.

We are of the opinion however that the issues which were submitted do not cover the whole merits of the case, and that without other findings on the part of the jury it is impossible to do full justice to the rights of both parties. Assuming it to be true, as we do from the verdict, that the plaintiff did not give her assent to a postponement of the marriage, and that the defendant's intestate refused to consummate it, it is still important to know from what cause that refusal proceeded — whether from a disregard of the plaintiff's feelings and his own plighted word, or from a consciousness, supervening his engagement, that he labored under a loathsome disease, incurable in fact, and of such a nature as to render him unfit to enter the marriage relation with any one. In his answer he alleged that his failure to comply really depended upon such a conviction on his part, and if such be true, this court could not hold that he was responsible in damages by reason thereof. We cannot understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself.

However once doubted, it is now generally conceded that if the performance of a contract be rendered impossible by the act of God alone, such fact will furnish a valid excuse for its non-performance ; and such a stipulation will be understood to be an inherent part of

every contract. It is likewise true, that whenever the main part of an executory contract becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why should not the same principle apply to a contract, the fulfillment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them ?

Our attention was called by counsel to the decision made by the Court of Queen's Bench, and afterward by the Court of Exchequer, in the case of *Hall v. Wright*, 96 Eng. C. L. Rep. 746, where a defendant was held liable, who after promise and before breach, became afflicted with bleeding from the lungs, whereby he became incapable of marrying without imminent hazard to his life. In making that decision, the court treated a contract for marriage as they would any other contract, saying, that though in bad health, the man might nevertheless so far perform his contract as to marry the woman, and thus secure to her the status and social position of his wife, and endow her with a wife's interest in his estate ; and if unwilling to do this, he should compensate her in damages for his refusal. We confess that we are not satisfied with this course of reasoning. In the first place, it is not possible to assimilate a contract like this to an ordinary contract for personal service, which if not capable of being wholly performed, may be partially so ; and in the next place, we believe it to be contrary to the understanding of men generally, that the acquisition of property or social position, either does or should constitute a main and independent motive and inducement for entering into such a contract.

The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are the comfort of association the *consortium vitæ*, as it is called in the books ; the gratification of the natural passions rendered lawful by the union of the parties ; and the procreation of children. And if either party should thereafter become by the act of God, and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise — the main part of the contract having become impossible of performance, the whole will be considered to be so.

In Pollock on Contracts, 370. (a book in which the principles of

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contract are treated of more philosophically than by any author known to us) the decision in *Hall v. Wright*, *supra*, is referred to, with the remark, that it is so much against the tendency of the later cases as to be now of little or no authority, beyond the mere point of pleading decided therein.

We are not unmindful of the fact that the malady under which the party in this instance labored was the legitimate result of his own imprudence; and that the evidence offered showed that the disease was upon him, when he gave his promise to the plaintiff. As to the first point, the same might have been said of consumption, or any other fatal and disqualifying disease; it too may have proceeded from imprudent and sinful indulgence, but if contracted when he owed no duty to the plaintiff, we cannot see how that can vary the case. The other is a point of more consequence; if knowing, or by using extraordinary diligence he might have known, that his infirmity was incurable, or of long duration, he entered into a contract with the plaintiff, his subsequent incapacity to perform it would furnish no excuse for its breach — so far from it, it would amount to a gross aggravation. But on the other hand, if he had reason to believe his disease was a temporary one, which might be healed in time to enable him to complete his agreement, then the law would hold him excusable for a breach resulting from a knowledge subsequently attained, that his disease was in fact not only incurable, but such as must necessarily be communicated to his wife, and probably to their offspring, in case he made her such and availed himself of his conjugal rights.

The law will constrain no man to assume a position so full of peril, as to have placed within his reach the lawful means of gratifying a powerful passion, at the risk of another's health or life, and the possibility of bringing into the world children in whose constitution the seeds of a father's sin shall lurk. As said in the dissenting opinion in *Hall v. Wright*, it would seem to be strange that a man should be liable in damages for not doing that which is against all law, human and divine.

Under the rules, without sending the case back, and without depriving the plaintiff of the benefit of the verdict in her favor upon the issues already submitted, the court directs these further issues:

1. Did the defendant's intestate refuse to perform his contract of marriage with the plaintiff, because of his being so diseased as to be unfit for the married state?

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2. Was he diseased at the time of making his agreement with the plaintiff ; and if so, had he reason then to believe that his disease was permanent, or likely to be of long duration ?

This course we pursue by virtue of the example set in *Barnes v. Brown*, 69 N. C. 439.

Per Curiam.

Judgment accordingly.

NOTE BY THE REPORTER.—*Hall v. Wright*, *supra*, seems however to be approved in *Boast v. Firth*, L. R., 4 C. P. 8, where MONTAGU SMITH, J., says of it : “ In the case of a contract to marry, the man though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position, so far as in his power, though he may be unable to fulfill all the obligations of the marriage state ; and it rests with the woman to say whether she will enforce or renounce the contract.”

BAKER V. CORDON.

(88 N. C. 116.)

Contempt — disobedience of injunction to discontinue trade.

The defendant sold to the plaintiff his druggist's business and agreed not to carry on that business at that town. Subsequently he bought a new stock and opened the like business at the same stand. He was enjoined by the court from so carrying on that business. Within a week thereafter he sold his new stock to two farmers, residing several miles distant, ignorant of the business and paying no personal attention to it, and commenced acting as their hired manager and agent in that business at the same stand. *Held*, that he was guilty of contempt in disobeying the injunction, and could not purge himself by disavowal.

PROCEEDINGS for contempt. The head-note states the facts.

Battle & Mordecai, for plaintiff.

John L. Bridges, Jr., for defendant.

SMITH, C. J., after stating the facts. It is quite manifest the injunction contemplated (and such is a fair interpretation of the words in which its intent is expressed) the defendant's personal disconnection with the drug business in the town, and the securing to the plaintiff the full measure of the expected fruits of his father's contract. Under the subsequent arrangement by which other pro-

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prietors are nominally substituted for himself, and he remains in possession of the assigned stock and continues to deal with it in all respects under the supervision of no superior, as before for all practical objects contemplated in the order, and with the same injurious consequences to the plaintiff, the defendant is "engaged in and carries on the business of selling drugs and medicines and preparing prescriptions," in direct disregard of the commands of the writ. He still pursues his calling, from which he is required to desist, doing the very acts inhibited, and not the less so because in the form of an assumed agency for other absent owners. Full obedience to the mandate required his personal separation from the drug business, and that he should neither be instrumental in inducing others to embark in it, nor carry it on himself within the prescribed limits. A less comprehensive meaning given to the terms of the order, and the exemption of the facts of the present case from the scope of its operation, would be to permit its essential and manifest purpose to be defeated, and render illusory the relief it professes to afford.

• After the first sale made with the understanding that the defendant would retire, and by refraining from competition leave to his successor the good will and patronage he had secured, upon the assumed existence of which understanding the restraint is imposed, and but a few days after his non-successful effort to have the injunction annulled, he transfers the very stock he was prohibited from using and disposing of in the occupation of a druggist, to two persons without knowledge or experience, and who exercised no controlling supervision in the management, and himself with no perceptible change except in the name of the proprietors continues precisely as he had done, to deal in the articles and to fill prescriptions for those who might apply. Surely such acts might be deemed, notwithstanding a valid assignment, evasive of the personal obligation imposed, and a violation of the restraining order.

We do not in thus holding say, nor do we suppose that the defendant could not have entered the drug store of another and acted in the subordinate character of clerk to the proprietor, without overstepping the restraints of the order; but his action and direct agency in this transaction, with the obvious design that the business he was then engaged in should be still carried on by himself, though nominally for others, renders him amenable to the charge of disobeying the mandate of the court, and not the less so on account of the assumed agency.

Roberts v. Lisenbee.

The brief filed by defendant's counsel points us to two alleged errors in the action of the court.

[Omitting the first.]

2. The disavowal of the imputed intent purges the contempt and exonerates the defendant :

This objection rests upon a misapplication of the rule laid down and acted on in the matter of *Moore and Others*, 63 N. C., 397. That rule is confined to the "class of cases" in the language of the chief justice who delivers the opinion, "*where the intention to injure constitutes the gravamen*" of the offense. The violation of a judicial mandate stands upon different ground, and the only inquiry is whether its requirements have been willfully disregarded. If the act is intentional, and violates the order, the penalty is incurred whether an indignity to the court, or contempt of its authority, was or was not the motive for doing it. A party is not at liberty by a strained and narrow construction of the words, and a disregard of the obvious and essential requirements of the order, to evade the responsibility which attaches to his conduct. In an honest desire to know the meaning and to conform to its directions, a mistaken interpretation of doubtful language would be a defense to the charge, but when its language is plain and the attempt is made to escape the force and defeat the manifest purposes of the order, by indirection, the penalty must be enforced, or the court would be unable to perform many of its most important functions. Bat. Rev., ch. 24, § 1, § 4; High on Injunction, § 852; *Pain v. Pain*, 80 N. C. 322.

There is no error, and this will be certified.

No error.

Affirmed.

ROBERTS V. LISENBEE.

(86 N. C. 436.)

Abatement — action against husband and wife for wife's wrong — wife's death.

An action against husband and wife for a wrong by the wife abates by the wife's death.

ACTION of slander. The head-note shows the point. The defendant had judgment below.

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J. H. Merrimon, for plaintiffs.

C. A. Moore and *H. B. Carter*, for defendant.

ASHE, J. It has been the policy of our law-makers since 1868, and even before that date to some extent, to emancipate the wife from many of the disabilities of coverture, resulting from the common-law doctrine of the merger of the legal existence of the wife in that of her husband.

This legislation commenced with the act of 1848, which restricted the common-law initial rights of the husband as tenant by the curtesy, in the lands of his wife acquired by her since the first Monday of March, 1849; then the act of 1871-'72, styled the "marriage act" (Bat. Rev., ch. 69) which invested the wife with many of the rights of a feme sole over her separate property, so that she may devise and bequeath her separate property; and all the property she acquires before or after marriage is her separate estate by virtue of section 6, article 10 of the Constitution. She may make certain contracts with her husband which are binding upon her. She may sue alone when the action concerns her separate property, and under some circumstances may even sue her husband without the intervention of a next friend. But while the wife has been thus legislated into a state of independence of her husband, as regards her separate estate, the legislature as a sort of compensation to the husband has relieved him from responsibility for the debts of the wife contracted before marriage, and from liability for her torts committed while being in a state of separation from him.

By the common law the husband was held liable to third persons for injury done by his wife, when they afforded ground for a civil action, though done without his knowledge or instrumentality; and this, not because there was any delict on the part of the husband, but from the necessity of the thing, arising from the incapacity of the wife to be sued without him. For as her legal existence was incorporated in that of her husband, she could not be sued alone, and if the husband was protected from responsibility, the injured party would be without redress. Hence the rule of the common law, that the husband and wife are both liable and must be joined in an action to recover damages in an action for a tort committed by the wife alone, without the direction and not in the presence of her husband. *McElfresh v. Kirkendall*, 36 Iowa; *Luse v. Oaks*,

id. 562 ; *Kowing v. Manly*, 49 N. Y. 192-198 ; s. c., 10 Am. Rep. 346 ; *McKean v. Johnson*, 1 McCord, 578 ; *Flanagan v. Tinen*, 53 Barb. 587.

This liability of the husband to be sued jointly with his wife for her torts attached to him at common law, notwithstanding that he and his wife were living at the time of the wrong done by her in a state of separation ; but the liability continued only so long as the matrimonial relation subsisted between them. McQueen on Husb. and Wife, p. 90. In 5 C. & P. 484, it was held that "whether the separation was temporary or permanent except for the adultery of the wife, it made no difference. It did not affect the question."

We think it more than probable it was this principle of the common law, holding the husband responsible for the torts of the wife committed in his absence and without his knowledge or connivance, that induced the legislature to enact that provision of the act of 1871-'73 (Bat. Rev., ch. 69, § 25) which provides that "every husband living with his wife shall be jointly liable with her, for all damages accruing for any tort committed by her." It was not intended, as we believe, to enlarge his responsibility, but to abridge his liability at the common law, so as to fasten responsibility upon him only so long as they should live together in the matrimonial relation, and as soon as that terminated, whether by separation or the death of the wife, the liability should no longer exist.

The qualification of the liability of the husband for the torts of his wife committed without his presence or knowledge, as subsisting only during the estate of marriage, was recognized by the common law. The wrong of the wife was not imputed to him. He was only joined with her "*ex necessitate*," because she could not be sued alone. The wrong was hers, not his. He was liable to the action only because of her liability, and therefore when her liability ceased his also ceased.

In *Capel v. Powell*, 17 C. B. (N. S.) 744, it is held that the "husband is not joined as a co-defendant on the ground that the wife's guilt is imputed to him, but so long as the marital relation continues the wife is incapable of being sued alone, and his liability continues only as the relation of marriage subsists." The corollary from this is, that where as in our case the wife who committed the injury dies, the liability of the husband must cease.

But independent of the conclusion to which the "reason of the

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thing" brings us, we find an authority in *Kowing v. Manly, supra*, for the position that when husband and wife are jointly sued for the wrong of the wife, and she dies during the pendency of the action, it will not survive against the husband.

We are of the opinion the action abated by the death of the wife.
No error. *Affirmed.*

WARLICK V. WHITE.

(86 N. C. 139.)

Marriage — deed from husband to wife.

A deed directly from husband to wife will not be upheld where she is an adulteress or the provision is extravagant.

ACTION to recover land and set aside a deed from a husband to his wife, on the grounds of the wife's adultery and the extravagance of the provision, the deed being of all the husband's estate. The defendant had judgment below.

M. L. McCorkle, Hoke & Hoke and Battle & Mordecai, for plaintiffs.

D. Schenck and G. N. Folk, for defendants.

RUFFIN, J. The opinion of this court is against the defendants upon both of the propositions stated in the case.

By the rule of the common law, which regards man and wife as one, every deed of gift made directly from husband to wife is void. But a court of equity, having a greater regard to the intention and convenience of the parties, and treating the deed merely as a defective conveyance, will uphold it in favor of the wife, if a clear and present purpose on the part of the husband to make the gift can be seen, and the gift itself appear to be no more than a reasonable provision for the wife.

But in the early case of *Elliott v. Elliott*, 1 Dev. & Bat. Eq. 57, this court intimated that under no circumstances would it interpose to remedy a defective conveyance in behalf of a wife, whose own conduct had not been meritorious; though as there was in the

case another clear ground, besides the wife's delinquency, on which to rest the decision, the court did not press that matter further. The opinion thus advanced in that case has since been referred to by another eminent judge, and in terms of such evident approbation, as to give to it much of the weight and authority of a positive adjudication. *Paschall v. Hall*, 5 Jones Eq. 108. And if there be any virtue in analogy, it is most strongly supported by the current of decisions of the English chancellors with reference to a kindred matter.

In *Carr v. Esterbrooke*, 4 Ves. 145, a wife, who was separated from her husband upon the ground of adultery, petitioned the chancellor to have a sum of money belonging to her settled to her separate use, but the order was refused upon the ground of delinquency. A like refusal and for a like reason was made by the same chancellor in *Ball v. Montgomery*, 2 Ves. 189, and again by Lord HARDWICKE in *Watkins v. Watkins*, 2 Atk. 96. All these cases are brought forward in Roper on Husband and Wife, 275, and the deduction made from them by the author is, that if a wife be an adulteress living apart from her husband, no court will interfere to have a settlement made for her even out of her own choses, "because she is unworthy of the court's notice or interference."

Such being the tendency of the decisions, both here and elsewhere, this court could not feel at liberty to interpose and give effect to an instrument which the law pronounces inoperative, in behalf of a wife possessing so little claim to consideration as the present feme defendant, but will rather leave the law to determine the rights of the parties. Indeed, would it not be manifestly inconsistent to do so, and make provision for her out of her husband's estate, when we are obliged to take notice of the fact that if he were now living and seeking a divorce the court would be bound to grant it under the existing circumstances, and thereby dissolve every bond between the parties and shut her out from all participation in his estate? Circumstanced as she is, she is forced to seek the aid of a court of equity to give effect to her husband's intentions in her favor; and the court, finding her unworthy of its interference, simply declines to act, upon the principle now conceded that he who seeks equity must do so with clean hands.

In considering the point as to the extravagance of the provision attempted to be made, it must be borne in mind that by means of the deed and the bill of sale, executed together and both to take

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effect upon delivery, it was intended to pass the whole estate of the husband, real and personal, immediately to the wife. The question therefore is exactly the same as if he were living and the attempt to set up the deed was directed against him, and not his heir. The leading case on the subject is *Beard v. Beard*, 3 Atk. 72, in which Lord HARDWICKE emphatically pronounced it to be against the policy of the law of England, that any husband should exhaust his estate and impoverish himself in an effort to make a provision for his wife, and that the court would not uphold a conveyance from him to her if such should be its effect. Still more to the point is 2 Story's Eq. Jur., § 1374, where it is said that if a husband should by deed grant all his estate or property to his wife the deed would be held inoperative in equity, as it would be in law, for it could in no just sense be deemed a reasonable provision for her, which is all that the courts of equity hold the wife entitled to, and in giving her the whole he would surrender all his interests.

On both occasions heretofore mentioned, when the question as to the effect to be given to the husband's conveyance has been before this court, especial pains seem to have been taken to declare the policy of the court to be, that no support will be given to an extravagant provision, exhaustive of the husband's estate.

Our opinion therefore is that the deed relied upon by the feme defendant, Naomi, is ineffectual to pass the title of the land sued for to her, and that the judgment of the court below should have so declared. Accordingly that judgment is reversed, and judgment will be entered here for the plaintiff according to the prayer of her complaint.

Error.***Reversed.*****SUTTON V. SCHONWALD.**

(88 N. C. 198.)

Sale — judicial — reversal of judgment.

The title of an innocent purchaser of land under a judicial decree is not affected by the subsequent reversal of the decree for irregularity.

ACTION to set aside a decree. The head-note and opinion state the point.

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direct proceeding in the same court) at the cost of an innocent purchaser.

If injured, the plaintiff must look for redress, either to him who falsely assumed to be her guardian, or the officer who incautiously passed her estate into his hands. Though, if it be true that an appointment of a guardian for her was really made, and that the omission of the clerk to record the same is the source of trouble between the parties, it would be better, perhaps, to have the record of the County Court so amended as to show the truth — which amendment can be made under the sanction of the Superior Court. *Stanly v. Massingill*, 63 N. C. 558.

The plaintiff's action must be dismissed with costs to all the defendants except the defendant Schonwald.

Judgment accordingly.

Error.

COLE v. COVINGTON.

(86 N. C. 205.)

Will — bequest of debt.

A bequest of a debt due from the legatee to the testator is subject to the debts of the testator, and the legatee shares in the residuary fund.

ACTION for construction of a will by which the testator bequeathed to certain persons "the amount of the debts they severally owe me."

Frank McNeill, for plaintiffs.

John D. Shaw, for defendants.

RUFFIN, J. The action is brought for the purpose of obtaining the advice of the court in construing the will of Stephen W. Covington. In the complaint several difficulties are suggested, as to all of which the parties received the advice of the court below, and a judgment was rendered in accordance therewith, from which a portion of the plaintiffs, to wit, J. M. Covington, C. M. Covington, W. W. Covington, C. C. Covington, and the defendant H. W.

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Covington, appealed, presenting for the consideration of this court but two points as to which advice is asked.

1. Whether in the distribution of the estate under the residuary clause and ascertaining the share of each of the nephews and nieces therein, the lands devised to some are to be considered, and if so, how the same are to be valued.

2. Whether in such distribution the debts forgiven to some are to be considered, and if so, how their values are to be ascertained.

[Omitting the first point.]

As to the other point: We feel ourselves constrained by the authorities to adopt a view differing from that which his honor seems to have taken of it. "If a testator expressly bequeaths the debt to his debtor, this being nothing more than a release by will, operates only as a legacy, and the debt is assets, and subject to the payment of the testator's debts." Williams on Ex'rs 1174. Again at page 1235, the same author says, if a testator by will forgive a debt due to him it is to be regarded in the light of a legacy, and like all other legacies, not to be sanctioned by the executor in case the estate be insufficient for the payment of debts.

In *Rider v. Wager*, 2 P. Wms., in speaking of a bequest of a debt to a debtor, the lord chancellor said it was no more than a release by will, which though not in strictness a release, being by will, could only operate as a legacy and must be assets and liable to pay the testator's debts. In *Anthony v. Smith*, Busb. Eq. 188, where a testator bequeathed to his debtor the bond which constituted the debt, and after making the will caused it for certain reasons to be renewed, this court held that such a renewal was no ademption of the legacy. But in *Cheshire v. Cheshire*, 2 Dev. & Bat., 254, the very point for consideration was whether such a bequest of a debt to the debtor should be regarded as an extinguishment of the debt, or as a legacy requiring the assent of the executor and the court say that after an examination of all the conflicting *dicta* on the point they adopt the conclusion that it is a legacy, as being most in accordance with principle and best sustained by authority.

Such being the nature of a bequest of this character it needs no straining of the testator's words to admit those persons to whom their debts were forgiven, to participate in the distribution provided for in the general residuary clause of the will, and to allow them the benefit of those debts in ascertaining the amounts they

severally are to take hereunder unless there be something beyond the mere use of the term "legacy," which indicates a purpose of the testator to exclude them.

In the case of *Sholl v. Sholl*, 5 Barb. 312, cited in 2 Redfield on Wills, 133, to which reference was made by counsel, the Supreme Court of New York held, that a specific bequest of one's indebtedness to the testator was not such a legacy as to entitle the debtor to share with other legatees in a contingent residuary fund. But there, the testator after having bequeathed to his brother a debt due from him, gave money legacies to divers other persons, and directed "that the said legacies, except that portion given to his brother, should be a lien upon his real estate, which real estate should be sold and from the proceeds thereof the said legacies paid; and it was held that the testator, by excepting the bequest to the brother from the operation of the clause making the legacies a lien upon his real estate, indicated a clear intention of excluding him from the participation in the proceeds of that estate.

In our case however we can discover no such purpose on the part of the testator to exclude that class of legatees. On the contrary, it occurs to us that full effect cannot be given to his main, primary intention, as expressed in the tenth clause of his will, except by admitting them as participants thereunder. What is that intention? Most obviously that after the payment of his debts and specific legacies, the residue of the fund arising from the sale of his property shall be divided amongst all his nephews and nieces previously mentioned — "the balance to be divided amongst my nephews and nieces herein mentioned" are the comprehensive words used, and "the legacies severally given to them," are referred to, not to indicate who shall take but the proportions of their respective shares.

The limited construction insisted on would wholly defeat the operation of the testator's words by excluding the three nephews mentioned in the eighth clause; whereas the more liberal one, and which seems to us to be the true one, leaves every word written to operate according to its natural import.

We are therefore of opinion that it was error to exclude those parties whose legacies consisted of their own debts, from all participation in the residuary fund, and to that extent the judgment of the court below should be modified.

There must be a reference to ascertain the values of those debts and supposing that the convenience of the parties will be subserved

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thereby, we direct that the cause shall be remanded to the court below, to the end that the reference may be there had.

Error.

Judgment accordingly.

SHAW V. BURNBY.

(88 N. C. 231.)

Bankruptcy — new promise — to agent.

A promise to an agent of the creditor to pay a debt discharged in bankruptcy removes the bar.*

Where a debtor discharged in bankruptcy says of a discharged debt that it is honest and he always intended to pay it, *held*, a question for the jury whether it is revived.†

ACTION on bond. The opinion states the facts. The defendant had judgment below.

R. O. Burton and E. T. Clark, for plaintiff.

Thomas N. Hill, for defendant.

SMITH, C. J. The plaintiff sues to recover the sum of \$125, with interest from February 5, 1872, due on the defendant's bond, and in reply to the answer setting up a discharge in bankruptcy as a bar to the action, alleges a new and subsequent promise to pay the debt. Upon this only issue submitted to the jury, the plaintiff testified that about the middle of May, 1881, the defendant came to his store and said that "the plaintiff's debt was an honest debt—it had more than any other relieved him;" and holding up a deed he added, "that he got the money to make the last payment on the land mentioned in the deed; he intended to pay the debt, and always intended to pay it."

A clerk in the employment of the plaintiff testified that in June, 1881, he was sent by the plaintiff to the defendant with a note to be signed by the latter in settlement of the debt. The defendant refused to execute the note on the ground of a false recital, that it

* See note, 35 Am. Rep. 417.

† See *Norton v. Shepard* (48 Conn. 141), 40 Am. Rep. 157.

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was for the last payment of the purchase-money due for the land, and said, "it is an honest debt and I will pay it certain."

The declaration of the defendant was admitted, not in proof of the promise itself, but as corroborative of the plaintiff's testimony.

The court being of opinion, and so intimating, that upon the evidence the plaintiff was not entitled to a verdict, he submitted to a nonsuit and appealed. There are therefore but two exceptions to the rulings brought up for review.

1. The qualified effect allowed to the evidence of the defendant's declaration to the plaintiff's clerk. This ruling, we presume, is predicated upon the interpretation put on the language used by the court in *Parker v. Shuford*, 76 N. C. 219, and *Faison v. Bowden*, id. 425, that the promise to pay or acknowledgment of a subsisting debt from which it may be inferred, in order to remove the bar of the statute of limitations, must be to the creditor himself, and is insufficient when made to a third person. This is a misapprehension of the meaning of the court as is explained in the subsequent case of *Kirby v. Mills*, 78 N. C. 124, in which it is said that a promise to the attorney of the creditor acting on behalf of his principal, is in legal effect a promise to the creditor, as if made to him personally, and that the other cases had reference to a stranger having no such relation to the creditor. As the witness was sent for the special purpose of adjusting the claim and was in the direct exercise of his agency in the transaction, the defendant was in law dealing with the plaintiff, and a promise if made would inure to his benefit. The evidence was therefore original and substantive and should have been received, as such, to support the alleged promise.

2. But the testimony was heard, and supposing it to be competent, the inquiry arises, were these declarations sufficient to go to the jury upon the issue of a re-assumption of the debt ?

The authorities are clear that to remove the bar of a discharge in bankruptcy and revive the debt, the proof should show a distinct and unequivocal promise to pay, notwithstanding the discharge and this is the rule announced by this court in *Fraleigh v. Kelly*, 67 N. C. 78, and approved in *Riggs v. Roberts*, 85 id. 151 ; s. c., 39 Am. Rep. 692. In *Stewart v. Reckless*, 4 Zab. (N. J.) 427, the words relied on were, that he (the defendant) had always told Stewart (the plaintiff) he intended to pay him, and the court say "the expression of an intention to do a thing is not a promise to do it. An *intention* is but the purpose a man forms in his own mind ; a *promise*

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is an express undertaking or agreement to carry the purpose into effect."

But a case in its essential features the same as that now before the court was decided in 1851 by the Supreme Court of Massachusetts. A witness swore, that at the plaintiff's instance he called on the defendant, with the accounts between the parties, and told him the plaintiff wanted him to do something about the note, and she would be glad to have a new note. To this the defendant replied, "he was not willing to put the principal and interest in a new note, but always said, and still say, *that she should have her pay.*" The court left the declarations to the jury as capable of meaning or expressing a promise, to determine whether the defendant intended by these words to promise to pay the debt. In the Supreme Court, SHAW, C. J., declared the instruction correct and remarked: "The evidence tended to prove two forms of expression used by the defendant; one declining to give a written promise, the other amounting to a verbal promise. The words, as he must have used them in the present tense in answer to a claim of payment to be made by him — 'I have always said, and still say that she shall have her pay' — are capable of being construed a promise, but might be counteracted by the other expression. It was for the jury to decide upon the credit of the witness and the accuracy of his recollection, and thus decide what was said." *Pratt v. Russell*, 7 Pick. 462.

It is the undoubted duty of the judge to construe and determine the legal import of a contract, whether written or parol, and equally in each case where its terms are explicit and well understood, but where they are indefinite or rest upon proofs apparently conflicting, it becomes the province of the jury to ascertain the intent of the parties and the contract entered into from the evidence, guided by suitable directions to aid them in their finding. *Isley v. Steward*, 4 Dev. & Bat. 160; *Massey v. Belisle*, 2 Ired. 170; *Festerman v. Parker*, 10 id. 474.

Whether the defendant in selling his interest in a gold mine said to the plaintiff, "If you will do the work I will warrant you will make your money in ten days," an instruction to the jury to inquire upon the whole conversation and subject matter, whether the words were used in commendation of the mine or as importing an obligation, was held to be correct. *Starnes v. Erwin*, 10 Ired. 226. And so it was submitted to the jury to determine from the attending circumstances whether the word "warrant" was used as an

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affirmation merely, or as an assumed liability, and this ruling was sustained in *Henson v. King*, 3 Jones, 419, NASH, C. J., remarking that whether there was "a warranty or not, was a question of fact for the jury: they were to say whether the parties intended a warranty."

Similar elements of uncertainty and repugnant expressions appear in the testimony of the witnesses in this case, not sufficient, in our opinion, to withdraw the evidence from the jury and conclusively determine its inadequacy to warrant a verdict, but such as required them, under proper instructions, to pass upon and decide. We are unable to distinguish the case, in this feature, from that of *Pratt v. Russell*, *supra*, and therefore declare there is error. The nonsuit must be set aside and the case submitted to another jury.

Let this be certified.

Error.

Venire de nova.

CAMPBELL V. BROWN.

(88 N. C. 376.)

Limitation — statute of — promise by joint debtor.

A promise by one joint debtor before maturity of the debt will not prevent the attaching of the statute of limitation as to another.*

ACTION on a joint bond. Defense, statute of limitations. It appeared that before the statute attached one of the defendants admitted the debt and promised to pay it. The plaintiff had judgment below.

C. A. Moore and H. B. Carter, for plaintiff.

J. H. Merrimon, for defendants.

RUFFIN, J. [Omitting a minor question.] Nor can we concur in the instructions, as given, with reference to the effect which the admissions and promises of one defendant should have upon the rights and obligations of the other. In England, as well as in

* See *Cocke v. Hoffman* (3 Lea, 105), 40 Am. Rep. 23; note, 35 Am. Rep. 417.

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most of the States of the Union, it is the generally admitted doctrine, that a payment made by one obligor in a bond before the expiration of the time necessary to raise a presumption of payment and within the prescribed period before the bringing of the action, will take the case out of the rule of presumptions as to all his co-obligors. Various reasons have been assigned for thus holding. In some of the cases it is said that a payment is an unequivocal admission of the debt as still subsisting, more reliable than any mere promise, as being more deliberately made and less subject to misconstruction. Again, it is said to be an act, which inures to the benefit of all the obligors alike, and of which each one could avail himself, in case he were sued on the bond within the time, and as they might take the advantage of it, so all must be bound by it. The correctness of the rule itself has been gravely doubted by some of the courts of the very highest respectability, and finally after some fluctuation in its decisions, it has been expressly repudiated by the Court of Appeals of the State of New York in *Shoemaker v. Benedict*, 1 Kern. 176, and the broad ground taken, that it is not within the power of the joint obligor, even by an actual payment on the bond, to bind the others — and such is said in 3 Pars. on Cont. 80, to be the tendency of the modern adjudications on the point.

In this State however the rule, which allows the obligations of one co-obligor to be affected by such a payment made by another, has been directly applied in *McKeethan v. Atkinson*, 1 Jones, 421; *Wilfong v. Cline*, id. 499; *Lowe v. Sowell*, 3 id. 67, and has been clearly recognized in a number of other decisions. It is now too firmly established to admit of a thought of its being disturbed by us. But farther than this our courts have never gone; and there seems to be no warrant of authority for the position that by a naked acknowledgment of the debt and a promise to pay it, whenever made and however unqualified they may be, can one obligor bind his co-obligor, and deprive him of the benefit of that presumption which the law makes in his behalf.

In *Lane v. Richardson*, 79 N. C. 159, we concede, there is a *dictum*, which appears at first sight to give it some support, but upon a closer examination it becomes perfectly manifest that the learned judge, who delivered the opinion of the court, was under no necessity to distinguish between the effect of a payment and that of a mere promise, and that in fact he did not undertake to

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do so. But in speaking of the effect of "the admissions of one joint debtor," he had in his mind only the payment that had been actually made in the case, and the effect of which was the very matter to be determined. Whenever the question as to the effect of a bare acknowledgment has been presented, so as to render a decision upon it necessary and proper, the rule adopted by the court, as we understand it, has been the very opposite of that laid down by his honor in the court below. Though somewhat obscurely reported, the point was presented in *Buie v. Buie*, 2 Ired. 87, and it was there held that even if there should be evidence of an acknowledgment sufficient to repel the presumption of payment as to one of two of the makers of a bond, still if the presumption was not repelled as to the other, the case would come within the rule as to both, and both would be protected by the statutory presumption.

Whatever obscurity there may have been about this case, it was afterward entirely removed by the opinion delivered in *Lowe v. Sowell*, *supra*, in which the late Chief Justice PEARSON uses the following language: "In 1841, while on the Superior Court bench, on the supposition that there was evidence to repel the presumption of payment in regard to one of the defendants, I instructed the jury, if the presumption was not repelled also in regard to the other defendant, they should find the issue on the plea of payment in favor of both, for if the presumption held as to one, payment by him discharged the debt. This ruling was approved by the Supreme Court, and the distinction was taken between matter which extinguished the debt, and that which only was a bar to the remedy. *Buie v. Buie*, 2 Ired. 87."

The rule, as thus expounded, was reiterated and enforced in *Pearall v. Houston*, 3 Jones, 346, and we do not feel at liberty at this day to depart from it.

All the cases referred to by counsel, in support of the plaintiff's position, had reference to unsealed instruments, and therefore fell under the "statute of limitations" proper, which affected only the remedy of the parties plaintiff, and as we have just seen, the law makes distinction between such cases and those in which the statute raises a presumption, such as affects the debt itself, and if unrebutted, extinguishes it.

It may be difficult to perceive any just principle upon which to base such a distinction, but it has been clearly marked out by the court and constantly observed. Indeed, if resort be had in the

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matter to principle, as distinguished from precedent, it is impossible to understand how, in any case, the unauthorized acts and declarations of one party, though he be jointly bound, can be admitted to enlarge the promises or extend the obligations of another, and hence we are not disposed to push the rule one inch beyond the requirements of the adjudicated cases.

To adopt the conclusion of the court below is in effect to say, that one of two joint obligors may, by an acknowledgment of the debt made on the last day of the ninth year after the execution of the bond, so operate upon the liability of his joint obligor, as to continue throughout another statutory period of ten years; and this without the assent of the latter, or as it may be, even without his knowledge.

We therefore feel constrained to reverse the judgment of the court below, though with some reluctance, since as disclosed in the evidence, we are inclined to the opinion that the promises of each one of the defendants may have been sufficient to repel the presumption as to himself, and that if the case had been so put to the jury, they might properly have returned the verdict they did against both.

Inasmuch however as it is impossible to know but that the verdict against one was the result of evidence with regard to the admissions and promises of the other, there can be no alternative other than a *venire de novo*.

Error.

Venire de novo.

BYNUM V. MILLER.

(36 N. C. 559.)

Estoppel — purchaser from fraudulent assignor.

One who has purchased goods from another who had previously made a fraudulent assignment of them is estopped, like his vendor, from impeaching the assignment.

THE opinion states the case. The defendant had judgment below.

Hoke & Hoke and Battle & Mordecai, for plaintiff.

D. Schenck, for defendants.

SMITH, C. J. The plaintiff and W. H. Miller, as partners engaged in trade under the firm name of Bynum & Miller, and owning a stock of goods, entered into a mutual agreement in dissolving their association, under which the former sold and assigned his individual share in the stock of goods then in possession to the latter, and the said W. H. Miller, by his deed of mortgage dated on April 20, 1878, reconveyed the said goods with such others as he might thereafter purchase and add to the plaintiff in trust to secure the payment of a debt therein recited to be due to the plaintiff in the sum of \$300, payable on the first day of November following, and containing a power of sale in default of payment. This was followed a week later by a second mortgage of the interest of said Miller in the same goods and future accessions thereto, in the way of replenishing the stock, with condition to be void if the said Miller should pay off and discharge the indebtedness of the partnership on or before the said first day of November, in full exoneration of the plaintiff, and in case of failure to do so vesting in him as mortgagee authority to make sale of the goods and apply the proceeds to the discharge of the firm liabilities and his own relief. These deeds were proved in November, and registered on December 6, of the same year, having been withheld until that time under an arrangement agreed on between the parties when they were executed, that they should not be registered unless the mortgagor "should be pressed" or become embarrassed, of which he was to give the plaintiff information, and that meanwhile Miller should retain and continue to dispose of the goods, as if they were his own.

On the 10th day of April, 1879, Miller executed a deed to the defendants for the entire stock of goods then on hand, of the estimated value of \$2,700 and of which the additions thereto since the date of the mortgages constitute the principal part, for the recited consideration of \$116 in money, and the surrender to Miller of his individual notes in the sum of \$2,000 due and owing when the mortgages were made, and of debts in a like amount since contracted.

The defendants took and claim the goods under this assignment, and refuse to surrender them or any portion of them to the plaintiff.

It was in evidence that the indebtedness of Bynum & Miller, at the termination of the partnership, was about \$2,300, which has

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since been paid off, the plaintiff having paid over \$700 of the amount and that the goods then on hand were more than sufficient for its discharge, besides firm assets in notes and accounts uncollected.

These issues were submitted to the jury :

1. Is the plaintiff owner of the property for which the suit is brought ?

2. Did the defendants J. F. Miller & Co. purchase the goods for value and without notice of the assignment ?

3. Was the sale and conveyance to the defendants made with the intent to hinder, delay or defraud the creditors of the assignor ?

The plaintiff asked instructions to be given to the jury to this effect :

1. The deeds to the plaintiff are sufficient in law to pass title to the goods as against Miller, the mortgagor, and against the defendants who claim under him, and can be impeached by neither.

2. To give effect to the assignment to the defendants, they must have bought the goods for a valuable consideration and without notice of the prior incumbrances, and the registration thereof was constructive notice of them.

3. If the conveyance to the defendants was with a fraudulent intent, it would be void as to the creditors of Miller and the plaintiff.

4. If the fraudulent purpose of Miller was known to the defendants, or they had information of such facts as reasonably authorized the inference that he entertained such purpose, in either case they would be participants in the fraud and could not defend against the plaintiff's title.

In the view we have taken of this appeal, it is necessary only to consider a single exception—the refusal of the judge to give the first instruction which would have been decisive of the right of recovery, and left only the damages to be assessed. In our opinion the exception is well taken and the jury should have been so charged.

Whatever diversity of views may exist elsewhere, the law is well settled by adjudications in this State, that a subsequent purchaser of personal property from one who has previously made a fraudulent assignment of it, or an assignment without consideration and for his own benefit, whether the purchase be with or without notice and for a valuable consideration, and such assignment has been proved and registered as required by law, stands in the place of his assignor, and neither is permitted to impeach its force and validity.

The estoppel upon the assignor extends to his subsequent vendee, and as to both, the conveyance, though it may be void as to creditors, is equally efficacious as to them.

We are content to recall some of the cases in which the proposition is stated and maintained.

In *Garrison v. Brice*, 3 Jones, 85, PEARSON, J., thus declares the law: "The statute of 13th Eliz. avoids voluntary conveyances of personal property, as well as land, as against creditors. But the 27th Eliz. avoids conveyances of land only, as against subsequent purchasers. So although the defendant is a purchaser for a full and valuable consideration, yet the deed previously executed by his vendor to the plaintiff, although voluntary and in trust for his wife and children, vested the title in the plaintiff and was valid, not only as against the husband, but as against the defendant who is a subsequent purchaser." He distinguishes the case from that of *Hiatt v. Wade*, 8 Ired. 340, cited in support of the opposite opinion in that, "grass was the subject of the conveyance, growing in the meadow," and treated as part of the land.

So again the same eminent jurist says in another case — *Long v. Wright*, 3 Jones, 290: "The position that a conveyance of slaves made with an intent to hinder, delay and defraud creditors is void against a subsequent purchaser who bought in good faith and paid therefor a fair price, is not supported by any statutory provision or by any principle of the common law." This statement of the law he defends upon an examination of the authorities, and referring to a suggestion of Chief Justice RUFFIN, in *Plummer v. Worley*, 13 Ired. 423, that the statute of 27th Eliz. is but an affirmation of the common law, proceeds, "The remedy given to subsequent creditors rests upon the enactment of the statute * * * and that in the absence of a statutory provision making it void against a subsequent purchaser, the legal effect of the deed (conveying slaves) was to take the title out of the debtor and vest it in the plaintiff's intestate, notwithstanding a fraudulent intent in regard to creditors and the trust intended for the debtor."

In *Warwick v. Wood*, 3 Jones, 306, the same judge delivering the opinion uses this language: "It is settled that 27th Eliz. (Rev. Code, ch. 50, § 2), which protects subsequent purchasers, does not embrace personal property, and the common law only protected against fraud rights which existed at the time of the fraudulent conveyance," citing and approving *Long v. Wright*.

Again in *Green v. Kornegay*, 4 Jones, 66, BATTLE, J., expresses the opinion of the court and reaffirms the doctrine. "The recent case of *Long v. Wright*, 3 Jones, 290, shows that the defendant, as the subsequent purchaser of a personal chattel, could not set aside the prior conveyance to the plaintiff's intestate. The case of *Williford v. Conner*, 1 Dev. 379, is equally in point to show that as a creditor, the defendant could take advantage of the deed to the intestate, being voluntary and fraudulent, only by reducing his debt to judgment and seizing the property under execution," or it may be added, by a direct proceeding in equity to have the fraud declared and the property subjected to his demand.

The only case that seems to look in a contrary direction, which we recall, is that of *Dukes v. Jones*, 6 Jones, 14, in which it is held that a bill of sale absolute in terms, but intended to operate as a mortgage or security only, was void against a subsequent *bona fide* purchaser under the registration law, for the reason that such instruments are effectual only when registered, and from the day of registration, against creditors and purchasers for a valuable consideration: and this bill of sale in the language of the chief justice "was put in such a shape that it could not be registered, for the registration of a deed, absolute on its face, cannot be the registration of a mortgage, so that a deed which does not set out on its face the true nature of the transaction is not susceptible of registration." Of the want of registration, purchasers as well as creditors who are put on the same footing, can alike take advantage. If the mortgage deed is upon its face fraudulent, and so to be adjudged in law upon an inspection of its provisions, as contended for the defendant, the registration is of an instrument complete in form and what it was intended to be, and the requirements of the statute are fully met; and if the infectious fraud is in the use to be made of it in keeping off creditors and securing the benefits to the debtor under an agreement preceding or attending the making of the conveyance, the case falls directly within the principle established in the adjudications to which we have referred, and from which we have largely quoted. When his honor stated to counsel for the plaintiff that the jury would be instructed that the plaintiff's mortgage deeds were in law presumed to be fraudulent and the burden rested on him to rebut the presumption in order to sustain his title to any portion of the goods, in deference to which a nonsuit was submitted to, he committed an error in law in applying the princi-

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ple to the facts of the case and placing the defendants in the same favorable position as if they were creditors and were enforcing their demands as such, in a due course of law.

We do not undertake to say what shall be the extent of the recovery, nor to pass upon any of the other exceptions. We simply decide that these vendees cannot impeach the mortgages by evidence of fraud in their inception, and in this respect succeed only to the rights of their vendor.

For the error pointed out there must be a new trial, and it is so adjudged.

Error.

Venire de novo.

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(88 N. C. 650.)

Criminal law — assault on several — bar.

The defendant fired twice in quick succession upon a crowd of persons who were conducting riotously about his house, and wounded A. at the first fire and B. at the second. *Held*, that an acquittal upon an indictment for assault upon A. is no bar to an indictment for an assault upon B. (*See note, p. 475.*)

INDICTMENT for an assault and battery. The jury returned a special verdict as follows: "That the defendant was indicted at the present term of this court for an assault on one Atlas Spivey, and upon that trial the State showed in evidence that on the 23d day of December, 1879, the said Atlas Spivey and Nathan Reynolds, and some eighteen more persons, went to the defendant's house with guns, bells, horns, and tin pans, and marched around the house, and when about to leave fired off the guns; and that the defendant thereupon fired a gun at them and in direction of the crowd, twice, in rapid succession, and one shot struck the said Spivey; and that upon such trial the defendant was acquitted by the jury; and further, that the evidence in the present indictment is to the same acts of the defendant, and that the said Nathan Reynolds was stricken by a shot from the defendant's gun fired as aforesaid. If in law these facts amount to a former acquittal, then the jury find in favor of the defendant; but if in law they do not amount to a former acquittal, then they find that he was not formerly acquitted." The defendant had judgment on this verdict.

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Attorney-General, for State.

Burwell & Walker, for defendant.

RUFFIN, J. To support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction ; but they must be for the same offense ; the same both in fact and in law. See note to 1 Bennett and Heard's Lead. Crim. Cases, 522.

In the principal case of *Rex v. Vandercomb*, 516, there referred to, and which was argued, as stated by Mr. Justice BULLER, before all the judges of England, it was held, that unless the first indictment were such as that the defendant might have been convicted upon it by proof of the facts contained in the second, then an acquittal on the former can be no bar to a prosecution for the latter. In *State v. Jesse*, 3 Dev. & Bat. 98, it was said by this court, in discussing the very point, that two offenses may have several circumstances in common, and yet to constitute either some other circumstance is to be added ; and it is the allegation on the record of this additional circumstance, peculiar to each, which constitutes them distinct crimes ; and therefore it is not always sufficient to make a judgment on an indictment for one a bar to an indictment for the other, that the same evidence may be competent and material to both. The true test is as stated in *Rex v. Vandercome* : Could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second.

Upon this principle it was that the Court of King's Bench held in *Rex v. Taylor*, 3 B. and C. 502, that if it appeared manifest to the court, from the inspection of the two indictments, that the offenses charged could not be the same, the defendant could not by averment show them to be the same, because that would be to contradict the record.

Now to apply this principle to the present case : The first indictment was for an assault on one Spivey ; could the defendant have possibly been convicted thereof upon proof of the averments contained in the record of the second, to wit, of an assault upon the prosecutor Reynolds ?

A battery is violence done to the person of another, and though there be but a single act of violence committed, yet if it's conse-

quences affect two or more persons, there must be a corresponding number of distinct offenses perpetrated. Accordingly it has been held that an acquittal on a charge of attempting to poison A. was no bar to an indictment for attempting to poison B. although on the same occasion and by the same act of preparation, because in such case, it was said, there were two distinct offenses. *People v. Warren*, 1 Parker C. C. 388. In like manner it was held in *State v. Slandifer*, 5 Porter, 523, that if one commit an assault by one stroke upon two persons, a conviction or acquittal upon an indictment, alleging the assault upon one, was no bar to a subsequent prosecution for the assault on the other. And still more to the purpose was the ruling of our own court in *State v. Merritt*, Phil. 134, to the effect, that an indiscriminate assault upon several persons was an assault upon each and every one of them.

It is true that a decision to the contrary of this was rendered by the court of Vermont in *State v. Damon*, 2 Tyler, 390; but it is said in a note to Archbold's Criminal Pr. and Pl. 112, to be against the weight of authority and repugnant to reason, and by Bennett and Heard, 534, to be clearly not law.

The decision in *State v. Jessy*, 3 Dev. & B. 98, has been twice approved by the court (*State v. Birmingham*, Busb. 120, and *State v. Revels*, id. 200), and the principle upon which it proceeded is clearly asserted in many of the elementary writers on criminal law (1 Chitty, 457; 2 East P. C. 519; 1 Whart. Cr. L. 505), and as it seems to us is easily distinguished from the *State v. Town Fayetteville*, 2 Murphy, 371, where the conduct complained of was one of mere neglect, and the omitted duty of keeping the streets in repair was an entire one, not susceptible of division into parts, so that each may become the subject of a prosecution.

How can it be certainly known what motive induced the verdict of acquittal in the former trial? For aught that can be seen, the jury in that case may have wholly disbelieved the evidence as to Spivey's being stricken, or even as to his being one of the company fired upon. If so, then clearly the verdict should not stand in the way of a prosecution for the battery upon one who was present and who was actually injured. It is true the last verdict establishes the fact both of his presence and the injury done him, but in the case supposed, which are we to adopt — the former or the latter finding?

No such difficulty can arise in the case of two prosecutions for the same identical act, for then the first verdict will conclude

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as to the truth of every matter necessary to support it, and will draw to it every intendment as well of law as of fact — a thing that cannot be done in favor of two contradictory verdicts. The only safe rule is to stand by the decisions of our courts, and to hold that the plea of *former acquittal* cannot avail, unless there should be an exact and complete identity in the two offenses charged.

Our conclusion therefore is that the plea relied on was not a bar to the pending prosecution against the defendant, and the State was entitled to judgment upon the special verdict.

The judgment below is reversed, and this opinion will be certified.

ASHE, J., dissented.

NOTE BY THE REPORTER.— Another analogous North Carolina case is *State v. Merritt, Phillips*, 134. The indictment charged an assault on A.; the proof showed that a gun was fired at A. and B., the shot passing between them. The indictment was held good, the court observing that an indiscriminate assault upon several is very clearly an assault upon each individual. But it was not held that separate indictments would lie. In *State v. Com'rs, 2 Murph.* 371, distinguished in the principal case on the ground that it was a case of mere omission of duty, the court however observed: "This notion of rendering crimes like matter, infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced."

In *Vaughan v. Commonwealth*, 2 Va. Cas. 273, it was held that if the defendant is indicted and acquitted of shooting A., and subsequently indicted for shooting B., the same act of shooting being charged in each case, the former acquittal will not be a bar, because the ground of acquittal might have been that the shot did not strike A., or that the shooting was not with intent to hurt A. Here there was but one discharge of the gun. In *Smith v. Commonwealth*, 7 Gratt. 593, a conviction of advising a slave to abscond was held no bar to an indictment for advising another slave to abscond, although the advice was at one and the same time and by the same words and acts. The court pronounced no opinion, but simply affirmed the conviction.

In *State v. Fife*, 1 Ball. 1, the defendant traded at the same time with two negroes without permit, and being indicted for the offense in separate indictments, he was held punishable under each. The court disposed of the argument that there was but one injury to the master, by saying that the injury was not an ingredient, or if it was, "it is certainly a repetition of it to buy from another." This begs the whole question by assuming one part of a simultaneous act to be a repetition of another part.

In *State v. Standifer*, 5 Port. 523, cited in the principal case, it was simply held that an acquittal of murder of A. cannot be pleaded in bar to an indictment for assault with intent to murder B. by the same transaction. The court said: "The offenses have no appearance of identity; they could not be included in the same indictment; and the evidence which would produce an acquittal of the one might produce a conviction of the other."

In *People v. Warren*, 1 Parker, it was held that an acquittal of attempt to kill A. by mixing poison in bread was no bar to a subsequent indictment for attempt to kill B. by the same transaction. The court distinguished between the act and the intent, saying: "The intent in these cases is the material constituent of the crime. Though the acts may have been the same, the crimes, as characterized by the intent, are different." But in an indiscriminate assault there can be no specific and distinguishable intent.

In *Tert v. State*, 53 Miss. 430, G. and W. were mortally wounded by two almost simultaneous but distinct shots by T. and S. lying in ambush together. Held that T. might be separately tried for each killing, and that he could not plead to an indictment for killing W., that he had been in jeopardy on trial for murder of G. This was put on the ground of the distinctness of the offenses, and the court declined to express a definite opinion on the general question now under consideration, on the ground that the point was not

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pleaded. On the point of distinctness the court observed: "It is believed that no well-considered case can be found where a putting in jeopardy for one act was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it was impossible to separate the evidence relating to them." This case seems parallel with the principal case in circumstances, and this reasoning supports the conclusion under examination. Both seem cases of distinct although closely consecutive offenses.

On the other hand: In *State v. Damon*, Tyler, 887, it was held that a conviction of assault and battery upon one may well be pleaded in bar to an indictment for assault and battery upon another, at the same time and by the same stroke. The court say: "It is a question between the government and its subject, and the court are clearly of opinion that the indictment cannot be sustained." They point out that redress may be obtained by private actions. Of this case ASHE, J., in his dissenting opinion in the principal case, observes: "But it is said, in the opinion of the majority of the court, that that case is not authority, and has been so declared by Bennett and Heard in their notes to their Leading Cases; and that it is also said by the annotator of Archbold Pl. and Pr. to be against the weight of authority. It is the opinion of three commentators against that of the Supreme Court of Vermont. So far as the weight of the authority is concerned, I prefer to stand by the court."

In *State v. Burham*, 7 Conn. 414, it was held that having in possession at one time several forged bank notes of different banks, with intent to pass them and defraud the person who should take them, and the several banks, constitutes but one offense. So in *State v. Egghart*, 41 Iowa, 574; s. c., 20 Am. Rep. 612, it was held of uttering four forged checks of different parties at the same time.

In *Clem v. State*, 42 Ind. 20; s. c., 13 Am. Rep. 309, it was held that where the same act results in the death of two or more persons, a conviction or acquittal as to one bars an indictment as to another. This is founded on *State v. Damon*, and the later larceny cases, *infra*.

In *Womack v. State*, 7 Cold, 508, it is held that where two persons are killed by one act the defendant may be indicted for the single offense of killing both, but to constitute such single offense, "something more should appear than that they were committed on the same occasion or in the progress of the same affray. Without attempting to state an abstract proposition, which shall serve as a test for all cases, it is sufficient now to say that if the physical acts of assault and killing are distinct, and the intention to kill one is an intention formed and existing distinct from and independent of the intention to kill the other, the two acts cannot constitute a single offense of murder."

In *Ben v. State*, 22 Ala. 9, it was held that an indictment charging in one count the administering of poison to three different persons is good. To this effect is *Woodford v. People*, 63 N. Y. 117; s. c., 40 Am. Rep. 463, holding that one indictment may charge the burning of a number of distinct dwelling-houses in the same block. There seems to be no doubt that where batteries of several are charged in one count, conviction or acquittal as to one bars a subsequent indictment as to the others.

In regard to larceny, etc., there is some contrariety. In *Com. v. Andrews*, 2 Mass. 439, it was held that a conviction of receiving stolen goods, the property of A., is no bar to an indictment for receiving stolen goods, the property of B., received at the same time and in the same parcel. But this seems to have been put partly on the ground that the statute awarded treble damages to the owners as against the thief, and as the thief had committed two separate crimes the receiver was accessory to two separate crimes. So in *State v. Thurston*, 2 McMull. 382, it was held that stealing goods of different owners at the same time constitutes distinct indictable offenses. But the contrary is held in *Wilton v. State*, 45 Tex. 76; s. c., 23 Am. Rep. 609; *Addison v. State*, 3 Tex. App. 40; *Hudson v. State*, 9 id. 151; s. c., 35 Am. Rep. 732; *Quitsow v. State*, 1 Tex. App. 47; s. c., 28 Am. Rep. 336; *State v. Hennessy*, 23 Ohio St. 339; s. c., 18 Am. Rep. 253.

In *State v. Horneman*, 16 Kans. 452, it was held that an acquittal of maliciously shooting and wounding a horse is no bar to an indictment for shooting with intent to kill a man, the shooting being the same act in both cases. This is clearly a case of different kinds of offenses, as well as of different natures of intent. But in *Fisher v. Com.*, 1 Bush, 221, it is held that an acquittal of stealing a horse bars an indictment for stealing a wagon and

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harness at the same time, and to the same effect, *State v. Williams*, 10 Humph. 101; *Jackson v. State*, 14 Ind. 387; *Lorton v. State*, 7 Mo. 55; *Rex v. Jones*, 4 C. & P. 217; *contra, Reg. v. Brettel*, Car. & M. 609.

In *Hinkes v. Commonwealth*, 4 Dana, 518, it was held that although setting up a gaming table and keeping a gaming table and inducing others to bet at it are distinct offenses, yet where they are committed by one person at the same time they are but one offense, may be laid in one count, and warrant but one penalty. In *Fiddler v. State*, 7 Humph. 508, it is held that conviction of running a horse-race is a bar to an indictment for betting on the same race. In *State v. Cooper*, 1 Green (N. J.), 361, it is held that a conviction of arson is a bar to an indictment for murder by means of that arson. The court said: "The defendant cannot be convicted and punished for two distinct felonies growing out of the same identical act, and where one is a necessary ingredient in the other, and the State has selected and prosecuted one to conviction."

Wharton says (Cr. Pl., § 408): "If A. in shooting at B. kills both B. and C., is his conviction under an indictment for killing B. a bar to a prosecution against him for killing C.? In answering this question let us remember that to join the killing of B. and C. in the same count would be a duplicity that would not be tolerated; and that if joined in the same indictment, in separate counts, the court would compel an election between the offenses. It would be necessary therefore to prosecute the cases separately; and if so, it is hard to see how a conviction or acquittal of the one could bar a prosecution of the other. To the indictment for killing B., for instance, A. might set up self-defense and be acquitted; but this might be plausibly argued to be an issue different from that which would be presented on his trial for killing B., should it appear that the killing of B. was an unprovoked or a negligent act. The killing of B. also may be malicious, as where A. designs to shoot B., while the concurrent killing of C. may be negligent, as where the ball after striking B. glances and strikes C., whom A. has no possible reason to expect to be at the spot, and whose death may be to him peculiarly abhorrent. An acquittal or conviction therefore for killing C. ought not on principle to bar a subsequent indictment for killing B., though the killings were by the same act."

Mr. Bishop seems less disposed than Mr. Wharton to express an opinion. The nearest he comes to it, so far as we can find, is in 1 Cr. Law, § 1060: "The doctrine of the previous sections goes far to establish the general one, that although when a man has done a criminal thing, the prosecutor may carve as large an offense out of the transaction as he can, yet he must cut only once. And if we receive this proposition with the understanding that the man may do several distinct criminal things in succession, and even by the same act provided no one covers the same ground as another, for each of which he is separately indictable, it seems just; yet it is but imperfectly supported; at least but indistinctly defined by the authorities." Then citing the *Damon* and *Fayetteville* cases, he continues: "On the other hand, probably the English and some of the American tribunals would decide the other way, in cases like both the two last mentioned ones." Again, at section 798: "The prosecuting power ought practically to be cautious how it carves; because not only may a miscalculation in the exercise of its discretion here result in a failure to convict, but it may, or again it may not, according to the circumstances, enable the prisoner, after trial, to plead the prior proceedings in bar of subsequent ones."

State v. Massey.

STATE V. MASSEY.

(88 N. C. 658.)

Criminal law — assault with intent to commit rape

The prosecutrix with a boy six years old was trundling a carriage with a baby in it. The defendant seventy-five yards distant shouted, "Halt, I intend to ride in the carriage; if you don't halt, I'll kill you when I get hold of you." The prosecutrix ran, trundling the carriage, and the defendant pursued, telling her to stop, until she came up with another woman. *Held*, insufficient to convict of assault with intent to commit rape.

CONVICTION of assault with intent to commit rape. The head-note states the facts.

Attorney-General, for State.

Reade, Busbee & Busbee, for defendant.

ASHE, J. That the defendant is guilty of an assault, according to the testimony of the prosecutrix, there can be no question; but we are of the opinion the evidence in the case did not warrant the jury in convicting him of the intent charged, and that the court erred in not submitting to the jury the instruction asked by defendant.

We think the jury should have been instructed that there was no evidence, or at least none reasonably sufficient, to maintain the charge against the defendant of an assault on the witness, with a felonious intent to have carnal knowledge of her person by force and against her will. Such a charge would have been substantially that asked for by defendant. But as the case was left to the jury without any instructions, they were at liberty to infer that the evidence was sufficient to warrant them in finding the defendant guilty of the assault with intent. In this consists the error. Where a judge refuses to instruct the jury that the evidence does not prove the offense charged in the indictment, it is good ground for exception.

In order to convict a defendant on the charge of an assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. Roscoe Cr. Ev. 310; *Rex v. Lloyd*, 7 C. & P. 318; *Joice v. State*, 53 Ga. 50.

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When the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal. "It is neither charity nor common sense nor law, to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent." *State v. Nesley*, 74 N. C. 425 ; s. c., 21 Am. Rep. 496. Dissenting opinion. Every man is presumed to be innocent until the contrary is proved, and it is a well established rule in criminal cases, that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence of the party accused, the court should instruct the jury to acquit, for the reason the proof fails to sustain the charge. The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

Even conceding that the defendant pursued the prosecuting witness with the intent of gratifying his lustful desires upon her, does it follow that he intended to do so "forcibly and against her will?" That is an essential element of the crime charged, and must be proved. It must be established by evidence that does more than raise a mere suspicion, a conjecture or possibility, for "evidence which merely shows it *possible* for the fact in issue to be as alleged, or which raises a mere *conjecture* that it is so, is an insufficient foundation for a verdict, and should not be left to the jury." *Matthis v. Matthis*, 3 Jones, 132 ; *Sutton v. Madre*, 2 id. 320 ; *Wittkowsky v. Wasson*, 71 N. C. 451 ; *State v. Bryson*, 82 id. 576.

There is no evidence in this case, in our opinion, from which a jury might reasonably come to the conclusion that the defendant intended to have carnal knowledge of the person of the prosecutrix, at all hazards and against her will. At most, the circumstances only raised a suspicion of his purpose, and therefore should not have been left to the consideration of the jury.

In the case of *Com. v. Merrill*, 14 Gray, 415, which was an indictment for an assault with intent to commit rape, the court say : "The nature of the charge presupposes that the intent was not carried out. It is therefore necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal or equally consistent with the absence of the

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felonious intent charged in the indictment, then it is clear that they are insufficient to warrant a verdict of guilty."

The attorney-general relied upon *Neely's* case. The opinion there was delivered by the late chief justice, to whose eminent abilities and learning we are always disposed to yield a becoming deference; but it was a divided court; there was a dissenting opinion filed by Mr. Justice RODMAN and concurred in by Mr. Justice BYNUM, both highly distinguished for their learning and legal acumen; and after a careful consideration of the different views of the question presented by these eminent jurists, we feel constrained to differ from the majority of the court, and adopt the reasoning and conclusion of the dissenting opinion, as enunciating the correct principle applicable to the case.

A *venire de novo* must therefore be awarded the defendant. Let this be certified.

Venire de novo.

Error.

CASES
IN THE
SUPREME COURT
OF
OHIO.

STEVENSON V. MORRIS.

(37 Ohio St. 10.)

Damages — counsel fees in action of assault and battery:

In an action of assault and battery evidence of the value of the services of the plaintiff's attorney in the action is incompetent.

ACTION of assault and battery. The opinion states the point. The plaintiff had judgment below.

F. D. Bayless and Evens & Maylor, for plaintiffs in error.

J. M. Wells, R. T. Naylor and Wm. Anderson, for defendant in error.

JOHNSON, J. [Omitting other questions.] VI. The plaintiff further to maintain the issue on her part, placed Henry Collings, an attorney at law, upon the stand, who was asked in chief, the following question :

Q. "What would be a reasonable attorney fee for prosecuting a case of this character?"

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A. "A reasonable attorney fee in this case — it having been heretofore tried twice, in the Common Pleas and District Court by petition in error — would be \$250 to \$300. In case reversal was brought about by error or want of skill on the part of plaintiff, the fee might be the other way."

To this question and answer defendant excepted.

In *Roberts v. Mason*, 10 Ohio St. 277, it was held that in an action to recover damages for a tort, which involves the ingredients of fraud, malice, or insult, a jury may go beyond the rule of *mere* compensation, and award exemplary or punitive damages, and that in such a case, they may, in their estimate of *compensatory* damages, take into consideration and include reasonable fees of counsel employed to prosecute the action.

In that case, there was no evidence before the jury on the subject of counsel fees, and the learned judge remarks: "nor do we think such evidence ought to have been given or received. But the fact that the plaintiff would necessarily be subjected to expenses of that kind was properly taken into consideration and allowed, as a circumstance in the case patent before them."

Finney v. Smith, 31 Ohio St. 529; s. c., 27 Am. Rep. 524, affirms the doctrine of the syllabus, in *Roberts v. Mason*, in holding that in cases involving the ingredients of fraud or malice, counsel fees are to be allowed as *compensatory* damages.

The settled doctrine in this State is that counsel fees, in cases of this class, may be an item of compensation, which the jury may, in its discretion, allow.

In *Roberts v. Mason* there was no evidence as to the value of counsel fees, and the court say, "nor do we think such evidence ought to have been given or received." Counsel claim that this remark, although purporting to be the opinion of the whole court, is *obiter* merely.

In that case it was necessary, in order to sustain the judgment, to hold that the jury might, without evidence, allow counsel fees, and the reason why that was so is given by the court, namely, that the fact that the plaintiff had been subjected to this expense, was patent before them. This would be a sufficient reason for not proving the fact that counsel was employed, and had rendered services, because that is patent to the jury, yet it would hardly be a satisfactory reason why the value of those services should not be proven, as that is a fact not patent in the case. Still we think the opin-

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ion then expressed, that such evidence should not be received, rests upon sound principles, and correctly states the only rule practicable in the trial of such causes.

In *Fairbanks v. Witter*, 18 Wis. 287, it is said, that if counsel fees are to be allowed by the jury, it must be on the principle that such fees are in the nature of *expenses* incurred, and therefore as compensation, rather than as a penalty, and this is the logical deduction from the cases of *Roberts v. Mason*, and *Finney v. Smith*, *supra*.

The able discussion of the question between Professor Greenleaf and Mr. Sedgwick as to the true rule of damages, in cases sounding in tort, or rather whether, in any case, punitive damages, as distinguished from compensation, could be allowed, turned at last largely upon the legal meaning of these terms; that is, whether, when the elements of fraud, malice, etc., mingle in the controversy, the damages, which the jury may give, in addition to *mere* compensation or such as are generally allowed, was to be classified as compensation for the greater injury, or as a penalty. In this State we have in these cases classified counsel fees as compensatory damages.

Counsel fees being in the nature of *consequential*, rather than *special* damages, fall within the general rule already cited that they are recoverable, without being pleaded.

The cardinal rule, that the evidence must be confined to the issue, requires that collateral issues, such as the value of counsel fees, in an action of tort, should be excluded.

If the plaintiff can present such an issue he cannot be limited as to the number of witnesses he may call, nor can the defendant be denied the right to call counter-witnesses to the same question. The issue legally before the jury is thus perverted into a contest as to the value of the services of plaintiff's counsel, in the very case they are trying. The counsel whose fees are the subject of controversy necessarily labors to show the highest value, though in fact he may be under a contract for a fixed price, much less than he can prove; while opposing counsel may depreciate these services, by showing that the value fixed is excessive, and by showing want of professional skill in the management of the case. To illustrate the incongruous nature of this controversy, the case at bar affords an apt illustration. The first judgment for the plaintiff was reversed by the District Court. Should plaintiff recover for these services?

That depends on whether the reversal was occasioned by the want of skill of his counsel, or by a blunder of the court. These questions would be material and would open an unseemly controversy.

Again, such an allowance by the jury rests in their discretion. It does not depend on the value of such services, but on whether the case is one in which it may be made. In allowing such fees the courts of this State have gone further than the courts of many other States, but in doing so, it was not intended to enlarge the issues to be tried by the jury. To permit such evidence would be to tender a verbal issue, on which each party would have the right to be heard, which was unknown at common law, and which would open a wide door to embarrassing and unpleasant controversy. It would involve no question of fact material to the case, but would call for the professional opinion of experts in such matters, based upon controverted questions in the case. This would involve an inquiry into the ability of plaintiff's counsel, the value of his services and the degree of skill with which he is managing the case on trial. In the practical administration of justice, the evidence should be confined to the issue, otherwise the court would be led into a labyrinth of difficulties. In leaving this matter to the discretion of the jury under all the facts before them, without proof of this character, we only follow the analogy of the law in all such actions, where, without actual proof of the amount of damages, the jury may in their estimate allow such an amount as will be adequate for the injury under all the circumstances. Counsel fees are not to be allowed, as of course, though proved, when the plaintiff recovers, as is the case where *special* damages, such as surgeons' services and expenses of nursing, etc., are claimed, but only as an item of estimated general damages to be included in the discretion of the jury.

Judgment reversed and cause remanded.

Morgan v. Nolte.

MORGAN V. NOLTE.

(37 Ohio St. 23.)

Constitutional law — punishment of known thief.

The legislature may lawfully authorize cities to punish known thieves, etc., found in the municipality.

HABEAS CORPUS. The opinion states the case.

John S. Murphy, for plaintiff in error.

Walter T. Logan, for defendant in error.

WHITE, J. The only question submitted in this case is, whether the council of the city was authorized to create the offense of which accused, Nolte, was convicted.

The ordinance is not made part of the record, but it is admitted that the charge is in accordance with the ordinance. If it were not so admitted, it must be presumed in the absence of any showing to the contrary in the record.

For the authority of the city council in the matter we are referred to section 2108 of the Revised Statutes. That section, among other things, provides that the council shall have power “to provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watchstuffer, ball-game player, a person who practices any trick, game or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself.”

One of the classes of persons against whom the council was authorized to provide, was known thieves. The accused was found to be of this class. The charge on which he was convicted was that of being a *known thief*, and found in the city of Cincinnati, contrary to the ordinance of the city. No question arises on the evidence, and the proof must be presumed to have been sufficient. That the creation of the offense was authorized by the statute we entertain no doubt. The statute declares that the council shall have power to provide for the punishment of *any known thief*. This brings us

to the question whether the enactment of the statute is within the power conferred upon the general assembly.

The only limitations to the creation of offenses by the legislative power are the guaranties contained in the bill of rights, neither of which is infringed by the statute in question. It is a mistake to suppose that offenses must be confined to specific acts of commission or omission. A general course of conduct or mode of life which is prejudicial to the public welfare may likewise be prohibited and punished as an offense. Such is the character of the offense in question.

The case of *Byer v. Commonwealth*, 42 Penn. St. 89, cited and relied upon by counsel in this case, has no direct bearing on the question now under consideration. The question there was whether the act of March 13, 1862, of the State of Pennsylvania, authorizing the summary conviction, without a jury, of professional thieves, etc., was valid under the Constitution of that State. The act under consideration in that case is found in 1 Brightley's Purdon's Dig., p. 346, § 158. The act was held constitutional, and the opinion in the case contains a learned summary of the law of England and of Pennsylvania on the subject.

The case of *People v. McCarthy*, 45 How. Pr. 97, involved a similar question arising under a statute of New York. The constitutionality of the statute was also upheld in that case.

In the present case no such question arises. The accused, under our law, was entitled to a trial by jury, as the punishment of the offense involved imprisonment. Rev. Stats., §§ 1788, 1819. He however waived a jury, and consented to be tried by the court.

At common law, a common scold was indictable; so also a common barrator; and by various English statutes, summary proceedings were authorized against idlers, vagabonds, rogues and other classes of disorderly persons. See Stephen's Dig. of Crim. L., art. 193. In the several States in this country similar offenses are created. In some of the States it is made an offense to be a common drunkard, a common gambler, a common thief, each State defining the offenses according to its own views of public policy. The case of *Commonwealth v. Hopkins*, 2 Dana, 418, was the prosecution of a person for being a common gambler; of *World v. State*, 50 Md. 49, for being a common thief.

In such cases the offense does not consist of particular acts, but in the mode of life, the habits and practices of the accused in re-

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spect to the character or traits which it is the object of the statute creating the offense to suppress.

The order of the Probate Court discharging the defendant in error from custody is reversed.

Order reversed.

STATE V. SMILY.

(87 Ohio St. 80.)

Libel—charge of searching house for stolen goods.

A false and malicious publication that one's house had been searched, under legal process, for stolen goods supposed to be secreted therein, is libellous *per se*.

INDICTMENT for libel. The head-note shows the case. The indictment was quashed below.

G. C. Rawlins, for plaintiff in error.

J. K. Mower, for defendant in error.

BOYNTON, C. J. The defendant was indicted for publishing a false and malicious libel concerning Tandy S. Collins. The indictment was founded on section 21, chapter 3, of the Crimes Act of 1877. 74 O. L. 246; Rev. Stats., § 6828. On motion of the defendant, the court quashed the indictment on the ground that it charged no offense. The correctness of this ruling is the only question arising in the case. It is claimed in argument, in support of the order quashing the indictment, that the matter charged as libellous is not actionable except upon averment and proof of special damage, and consequently that the publication cannot be made the subject of an indictment.

This result undoubtedly would follow if counsel are right in the position that proof of special damage is essential to recovery, in a civil action by the party concerning whom the publication is made. Such proof however is not essential to recovering, as will be presently shown. Counsel have fallen into an error in assuming that the rule applicable to words spoken applies with all its limitations to matter that is written and published.

In *Watson v. Trask*, 6 Ohio, 531 (27 Am. Dec. 271), it was said that "a libel in reference to individual injury may be defined to be a false and malicious publication against an individual, either in print, writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt, or ridicule." "Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel because of their being embodied in a more permanent and enduring form; of the increased deliberation and malignity of the publication, and of their tendency to provoke breaches of the public peace."

In *Tappan v. Wilson*, 7 Ohio, 190, it was further said that the "tendency of the publication," being malicious, "is to degrade and lessen the standing" of the person concerning whom the publication is made, it is a libel. The general current of authority to the same effect, holding that although the matter published might not, without averment and proof of special damage, be actionable, if only spoken, yet if published, and it be of a character which, if believed, would naturally tend to expose the person concerning whom the same was published, to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence in social intercourse, such publication is a libel, and an action will therefor although no special damage is alleged. *Tillson v. Robbins*, 68 Me. 295; s. c., 28 Am. Rep. 50; *Dexter v. Spear*, 4 Mas. 11; *Smart v. Blanchard*, 42 N. H. 151; *Adams v. Lawson*, 17 Gra. 250; *M'Gregor v. Thwaites*, 4 D. & R. 695; *Thorley v. Kerry*, Taunt. 354; *Villers v. Monsley*, 2 Wils. 403; Starkie on Libel and Libel, § 153; see note to *Steele v. Southwick*, 1 H. & W., A. Lead. Cas. 123; Roscoe Ev. 791; 2 What. Cr. Law, § 1598.

In *Cropp v. Tilney*, 3 Salk. 226, Lord HOLT said: "Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible or ridiculous."

In *Shipley v. Todhunter*, 7 C. & P. 680, TINDAL, C. J., said that "any written communication which bears on the face of it a charge, or which tends to vilify another, is a libel."

In *Woodard v. Dowsing*, 2 M. & R. 74, it was said, that "a written publication, which tends to disgrace, is actionable." And in *Sexton v. Spear*, *supra*, it was said by Judge STORY, that "a publication, the tendency of which is to degrade or injure another

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person, or bring him into hatred, ridicule, or contempt, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society, is a libel."

In *Bell v. Stone*, 1 B. & P. 331, the action was for publishing of the plaintiff that he was a "villain." The plaintiff failing to prove special damage, the court directed a verdict for the defendant; counsel however contending that inasmuch as the charge was in writing, it was actionable without proof of special damage, the court asked the jury what damages they would give supposing the plaintiff entitled to recover in point of law. They answered, one shilling. Subsequently a rule was granted on the defendant to show cause why the verdict in his favor should not be set aside, and a verdict entered for the plaintiff; and upon the hearing, the court expressed themselves "clearly of the opinion that any words, written and published, throwing contumely on the party, were actionable," and ordered the rule to be made absolute. These authorities abundantly show that in many instances a marked distinction exists between words spoken, and the same words written and published; and that words written or printed and published, imputing to another any act, the tendency of which is to disgrace him, or to deprive him of the confidence and good will of society, or lessen its esteem for him, are actionable *per se*, and consequently lay the foundation for an indictment under the statute.

There can be no doubt, within the principle of these cases, that the indictment in the present case charged the offense of libel. No one could read the article set out, assuming its statements to be true, without regarding it as seriously reflecting on the character of Collins. It directed public attention to the fact, that the circumstances implicating him in the larceny, or in receiving and secreting the goods stolen, were sufficiently suspicious to justify a search of his house for their recovery. Such being the tendency of the publication its libellous character is clearly established; and especially is this so, when the fact is considered, that in case the goods or any part thereof were found, upon such search, the statute expressly required the owner to be arrested and taken before the justice. 1 S & C. 816.

[Minor point omitted.]

Exceptions sustained.

STATE V. BEAL.

(37 Ohio St. 103.)

Criminal law — burglary — intent.

One who breaks and enters a building with intent to steal money from a safe is guilty of burglary, although there is no money in the safe. (*See note, p. 492.*)

INDICTMENT for burglary. Acquittal. The opinion states the case.

Edward S. Dowell, prosecuting attorney, for State.

BOYNTON, C. J. The judge presiding at the trial seems to have been of the opinion that the averment of an intent to steal the personal effects or property of the owner of the building broken into is not sustained unless property belonging to such owner and which the accused intended to steal was found within the building. The instruction in effect directed the acquittal of the defendant if no money was kept in the safe, although he believed money would there be found, and the breaking and entry were with the intent to steal it. In this we think the court erred. Burglary, under the statute, involves the ingredients of breaking and entering the building, in the night, forcibly or maliciously with intent to commit a felony or with intent to steal property of some value. It differs but slightly from burglary at common law. 2 East P. C. 484. The offense is complete when the facts entering into the above definition exist, whether the intent is executed or not. It has been repeatedly held and the rule is well established, that in an indictment for burglary it is not necessary in alleging the intent to steal to specify to whom the goods intended to be stolen belong. It was not required at common law, nor is it under the statute. *Queen v. Nichols*, 1 Cox C. C. 218; *Reg. v. Lawes*, 1 C. & P. 62; 2 Russ. on Cr. (9 Am. ed.) 44.

The breaking and entering with the felonious intent constitute the offense. It is true, that in *Queen v. Jenks*, the trial of which is reported in 2 Leach (4 ed.), 774, the court held upon review, that where a specific intent is laid to steal the goods of one, not the owner of the building, the intent must be proved as laid. 3 East

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P. C. 514; 2 Russ. on Cr. 44. The doctrine of this case has not met with universal approval, its correctness being denied by Mr. Bishop in 2 Bish. on Cr. Law, § 114, where it is asserted that if it appear that there were a breaking and entry with intent to steal, a conviction should follow, although the specific intent charged is not established by the proof. Whether the rule in Jenks' case is correct or not we need not stop to inquire, as the present case seems clearly distinguishable from it. The question here is whether the act of breaking and entering with intent to steal money from the safe of the owner of both the building and safe, in the belief that money was there, is reduced to a mere trespass from the circumstance that contrary to the expectation of the defendant, no money was there found, coupled with the fact that the safe was not used as a place for its deposit. We think it was not. The offense was complete whether money was there deposited or not. The breaking and entering were with intent to steal the property of Houts. This brings the case within both the words and object of the statute. The public security was as much disturbed by the act committed, as if money had been actually found. The offense is one against the security of property, and the failure to execute the intent was the result only of an unforeseen and unexpected circumstance. Where a statute makes an assault upon a person with intent to steal from his pocket a criminal offense, it is no answer to an indictment charging such offense that nothing was found in the pocket. It has been repeatedly held that where the hand is thrust into the pocket with intent to steal what may there be found, the offense is complete whether any thing be found or not. *State v. Wilson*, 30 Conn. 500; *Hamilton v. State*, 36 Ind. 280; s. c., 10 Am. Rep. 22; *Commonwealth v. Jacobs*, 9 Allen, 274; 1 Bish. Cr. Law, § 743, *et seq.*

A distinction seems to prevail in the English cases, between an attempt to commit a felony and an act done with intent to commit it. In *Queen v. Goodall*, 2 Cox C. C. 41, the accused was indicted for using an instrument upon the body of Catharine Snowden with intent to procure a miscarriage. The statute declared that whosoever, with intent to procure the miscarriage of any woman, shall * * * unlawfully use any instrument, etc., * * * shall be guilty of felony. It appeared from the evidence that the instrument was used with the intent laid in the indictment; but the medical witnesses stated from the result of a *post-mortem* examina-

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tion, that Catharine Snowden was not pregnant at the time the instrument was used. Upon reservation of the question for the consideration of the judges, it was held immaterial whether the woman was in fact pregnant or not. In *McPherson's* case, it was held that where a statute makes it an offense to attempt to commit a felony, the attempt must be to do that which if successful would have constituted or resulted in a felony, and consequently that where the attempt charged was to steal certain goods from a dwelling-house no conviction could be had, it appearing that the goods had been previously stolen by some one else. Dearsley & Bell, 197. COCKBURN, C. J., in delivering the opinion however remarked, that "attempting to commit a felony is clearly distinguishable from intending to commit it."

That this distinction is not supported by the American cases is asserted by both Mr. Bishop (1 Bishop Cr. Law, § 742) and by Mr. Wharton (1 Whart. Cr. Law, § 186). See Holmes on Common Law, 69. In the present case it is not necessary to examine the ground on which the distinction is said to rest. We are of the opinion that the breaking and entering the warehouse of the prosecutor as alleged, with intent to steal money supposed to be in the safe within the building, was burglary, notwithstanding the fact that no money was there found or kept. The failure to accomplish the result contemplated was wholly independent of the defendant's will, and did not in the least mitigate the turpitude of the offense.

The statute was designed to afford security against a breaking and entering with intent to steal, and when the act and intent concur the statute is none the less violated, because through some unforeseen circumstance the criminal enterprise proves unsuccessful in its result.

Exceptions sustained.

NOTE BY THE REPORTER.—In *People v. Jones*, 46 Mich. 441, it was held that it is no defense to a prosecution for attempt to commit larceny from the person that the person had nothing to take. Adopting *Com. v. McDonald*, 5 Cush. 365.

In the recent case of Mason, convicted by court-martial of an assault on Guiteau, Judge Advocate-General SWAIM instructed the president that Mason was not guilty of an assault on Guiteau, because "Guiteau being in a reclining position on his cot, a substantial brick wall intervened between him and the line of fire, and he was therefore in absolute security from any effort Mason might make to shoot him at the time." And he quoted from Wharton: "Where however there is wanting apparent and real ability to hurt in any way there is generally no assault." "Where the ability to commit a felonious attack is apparent and really wanting, there is generally no assault." According to his views it would be no assault for one to shoot at another in the dark, when he could not see him, or behind a tree, or through a closed door. Mason knew Guiteau was in the room; he did not know he was out

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of his line of fire; he fired into the room, as nearly at him as he could and intending to kill him; and his bullet lodged in the room near Guiteau. This is clearly an assault. The case would have been different if Guiteau had not been in the room or had been beyond shooting distance. The putting Guiteau in fear was in itself an assault. It has been held that a threat to strike, although not within striking distance, is an assault, justifying self-defense. *People v. Yslas*, 27 Cal. 690. So of a threatening advance with an intent to strike, although the aggressor was stopped before he got within striking distance. *Stephens v. Myers*, 4 C. & P. 349; *State v. Vaunoy*, 65 N. C. 582. So of riding after a person so as to compel him to seek shelter. *Morton v. Shoppoe*, 3 P. & P. 873. So of chasing and shooting at a woman, whereby she is put in fear, and retreats to a place of safety. *State v. Neely*, 74 N. C. 437; s. c., 21 Am. Rep. 496. Still more nearly in point is *Mullen v. State*, 45 Ala. 43; s. c., 6 Am. Rep. 691, where the accused presented a loaded gun at another person, and snapped it three times, but it did not explode because there was no cap on it, and it was held that if the accused supposed there was a cap on it, there was an assault. So in *Hamilton v. State*, 36 Ind. 280; s. c., 10 Am. Rep. 22, a conviction was had of assault with intent to take a five dollar bill, although the person assaulted had no such bill. Mr. Bishop says: "There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created. Therefore if within shooting distance one menacingly points at another with a gun, apparently loaded, yet not loaded in fact, he commits an assault the same as if it were loaded." In *Com. v. White*, 110 Mass. 407, it was held that this would be so even if the accused knew the gun was not loaded. But this has not been generally accepted. There can be no doubt that if one shoots a bullet into a room, intending to hit a person whom he knows to be in the room, and whom he does not know to be out of reach of his shot, he is guilty of an assault. There is an apparent ability to hurt; the act is adapted to the end; and as Mr. Bishop says, "the adaptation need only be apparent." So says Dr. Wharton in effect. See *State v. Martin*, 85 N. C. 503; s. c., 29 Am. Rep. 711 and 712.

MERRICK V. MERRICK.

(37 Ohio St. 126.)

Will — mistake — construction.

A testator owned only 160 acres of land, one-half in section 27, the other being the east half of the north-east quarter of section 28. He devised the former half by a correct description, but in devising the other the word "south" was used by mistake for "north." *Held*, that the erroneous part should be rejected, and the devise would take effect. *

SUIT for construction of a will. The will provided as follows:
 "Item 2. I give and bequeath, after the death of my wife, to my son, Robert Merrick, the west half of the north-west quarter of section number twenty-seven (27), township one (1), south range three (3), east, he paying Frank Merrick, son of J. J. Merrick, two hundred dollars, at the time, he, Frank Merrick arrives at his ma-

* See *Sherwood v. Sherwood* (45 Wis. 357), 30 Am. Rep. 757; *Mooreland v. Brady* (8 Oreg. 308), 34 Am. Rep. 581.

jority ; and he is to pay Isia O. Merrick, daughter of J. J. Merriell at the time she arrives at her majority, one hundred and fifty dollars. Elmer Merrick, the oldest son of Isaac Merrick, two hundred dollars at the time he arrives at his majority."

"Item 3. I give and bequeath to my son, Adam R. Merrick after the death of my wife, the east half of the south-east quarter of section number twenty-eight (28), township one (1), south range three (3), east, containing eighty acres of land more or less. And he, the said Adam R. Merrick, has to pay Mary Elsie Merrick, his daughter, three hundred dollars when she arrives at her majority, and his son, Charles H. Merrick, two hundred dollars, at the time he arrives at his majority, and he is to pay Adam W. Smith, one hundred and fifty dollars, at the time he arrives at his full age at his majority."

The opinion states other facts.

Alexander & Saltzgaber and I. D. Clark, for plaintiffs in error.

Price & Shissler, for defendant in error.

OKEY, J. By statute authority is granted to an executor to maintain a civil action in the Court of Common Pleas, asking the direction of the court in any matter affecting the trust, estate or property to be administered, and the rights of the parties in interest. 54 Ohio L. 202, § 8 ; Rev. Stats., § 6202. And see *Rothgeb v. Mauck*, 35 Ohio St. 503.

This jurisdiction Adam R. Merrick has invoked ; and the evidence fully supports the claim, that while the will on its face is free from ambiguity, the word *south*, in its third item, was inserted by mere mistake of the scrivener, the testator intending that the word *north* should be used. The sole question therefore is whether, on proof of such fact, it is competent for the court to declare that the east half of the north-east quarter of section 28 passed by the will to Adam R. Merrick on the death of his mother.

As there is a parcel of real estate which is accurately described in the third item of the will, it might well be argued, if that clause stood alone, that the testator must have believed he had some devisable interest in the land, and hence that the devise related to such land although in point of fact he had no interest in it whatever. *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674 ; s. c., 14 Am. Rep. 538 ; *Kurts v.*

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Hibner, 55 Ill. 514 ; s. c., 8 Am. Rep. 665 ; 2 Randolph & Talcott's Jarman on Wills, 403. But the clause does not stand alone, nor is it to be construed as standing alone. On the contrary regard must be had to the whole instrument ; and while the will can only be properly construed by its words, we may be aided in such construction by evidence of the situation of the testator, with respect to his property and the objects of his bounty, at the time the language was employed. *Worman v. Teagarden*, 2 Ohio St. 380.

The inquiry then is whether the description in the third item is referable to the fact that the testator must have supposed he had a devisable interest in the premises there described, or whether the mistake claimed, that is, the use of the word *south* when *north* was intended, was really made. Which is the more reasonable supposition? It appears that the testator had no interest whatever in the land there described, at the time or after the will was executed. It then belonged to and was in the possession of his son Isaac, and the theory that the testator was perfectly aware of that fact is certainly reasonable. On the other hand he did own the east half of the north-east quarter of the same section — indeed, resided on it when the will was made and until he died ; and it is not denied that it is embraced in the devise to his wife, for he devised to her, for life, all his real estate, consisting of two eighty-acre tracts. One of these tracts he devised by proper description to his son Robert, on the death of his mother, charged with certain legacies, and unless the other tract was devised to Adam R., at the death of his mother, it will pass at her death to the testator's heirs. But a testator is not presumed to intend to die intestate as to any interest in his property to which his attention seems to have been directed. *Collier v. Collier*, 3 Ohio St. 369. Again, unless the testator intended by the third item to devise the tract in the north-east quarter which he really owned why postpone the taking effect of such devise until the death of his widow? Isaac, as we have seen, was the owner and in possession of the land in the south-east quarter, and it is not reasonable that the testator believed his widow could derive any advantage from a devise to her of that land during life. Moreover, why charge the land devised to Adam R. with the payment of \$650 in legacies, unless he intended to devise the premises he really owned? Would he make such charge on land in which he had no interest, on the supposition that he had some claim upon it? Besides, at the time the will was executed, Adam R. Merrick had resided with

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his family on the north-east quarter in question for more than years, and he continued to reside thereon. Is it not reasonable to suppose that the testator desired him to have the land upon which he resided? Clearly, all the land which the testator owned was devised to his wife for life, and the inference is irresistible that the same land, and no other, was devised to his two sons, Robert and Adam R., at the death of Mrs. Merrick. One moiety of it passed by clear words to Robert on the death of his mother; and rejecting the erroneous description, the word south, sufficient appears on the face of the will, in the light of the facts here disclosed, to warrant us in saying that by the will of Adam Merrick the other moiety of the east half of the north-east quarter of section 28, Hoaglin township, Van Wert county, passes to Adam R. Merrick, on the death of his mother. And thus the case is determined by a just and proper application of the maxim, *falsa demonstratio non nocet*. *Ashworth v. Carleton, Banning v. Banning*, 12 Ohio St. 381, 437; 1 Randol & Talcott's Jarman on Wills, 734, 744; 2 id. 390.

Judgment affirmed.

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(37 Ohio St. 178.)

Criminal evidence — cross-examination of prisoner.

One on trial for murder, testifying for himself, was asked on cross-examination if he had not been arrested for assault with intent to kill. The question was objected to, but the objection was overruled, and the prisoner answered without claiming his privilege. *Held*, no error.

CONVICTION of murder. The opinion shows the point.

Anderson & King, for plaintiff in error.

M. W. Johnson, prosecuting attorney, for defendant in error.

JOHNSON, J. 1. Did the court below err in overruling the defendant's objection to the foregoing question put by the State on cross-examination of defendant? If so, was the error such as to require a reversal of the judgment?

The defendant, having voluntarily offered himself as a witness,

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in his own behalf, and testified in chief, thereby subjected himself to a legitimate and pertinent cross-examination. While occupying the witness stand he was entitled to the same rights and privileges, and was subject to the same rules of evidence as any other witness. *Brandon v. People*, 42 N. Y. 267. The fact, that he was also a party accused of a crime, clothed him with no greater rights or privileges as a witness, nor subjected him to any different rule of cross-examination from others. The same latitude and the same limitations apply to his cross-examination, as if he had not been a party. As a party his right to object to incompetent questions, addressed to himself as a witness, are the same as if they were addressed to any other witness. The State cannot by its own witnesses, nor by a cross-examination of defendant's, give evidence of facts tending to prove another distinct offense, for the purpose of raising an inference of the prisoner's guilt of the particular crime charged. *Coble v. State*, 31 Ohio St. 100; *Hamilton v. State*, 34 id. 82; *Commonwealth v. Thrasher*, 11 Gray, 450. This limitation on the extent of a cross-examination applies to the cross-examination of the defendant himself. As a party, he has the right to object, because such evidence is incompetent.

But the defendant, while a party, was also his own witness, subject to cross-examination.

If error would not lie to a like cross-examination of any other witness, as to his previous conduct, for the purpose of affecting his credibility, we see no reason why it should, when a party himself is the witness. The object and importance of a cross-examination of a defendant is the same, and therefore the rules governing it should be the same. In matters collateral and irrelevant to the particular charge, it is difficult to define with precision the limits of such cross-examination when the object is to test the credibility of a witness.

In this court the question may be regarded as settled, that "the limits to which a witness may be cross-examined on matters not relevant to the issue, for the purpose of judging of his character and credit from his own voluntary admissions, rest in the sound discretion of the court trying the cause. Such questions may be allowed where there is reason to believe it will tend to the ends of justice; but they ought to be excluded when a disparaging course of examination seems unjust to the witness and uncalled for by the circumstances of the case." *Wroe v. State*, 20 Ohio St. 460.

In that case one of the questions asked the witness on cross-examination was: "Are you not now under indictment for murder in the second degree in this court?" The defendant objected, his objection was overruled, and the witness answered that he was but had pleaded not guilty.

After a careful review of the authorities the conclusion stated was reached, and for the reason that the limits of such a cross-examination must in a great measure rest in the sound discretion of the court trying the case. This court therefore refused to reverse the judgment, there appearing no abuse of that discretion. That case is decisive of this unless it be that defendant's rights as a party add a limitation to the cross-examination that does not exist in the case of another witness. In this respect *Brandon v. People*, 42 N. Y. 265, is exactly like the case at bar.

The defendant was indicted for larceny and after evidence was given in support of the charge, she was placed upon the stand in her own behalf and denied her guilt. On cross-examination she was asked if she had ever been arrested for theft. Her counsel objected but the question was allowed, and she answered that she had. The court after laying down the principle that the defendant as a witness was subject to the same rules as other witnesses, refused to reverse the conviction, holding that any abuse of this latitude of cross-examination is guarded against in two modes: (1) By the privilege of the witness to decline to answer any question which may disgrace him or tend to charge him as a criminal; (2) By the power of the court to prohibit an unreasonable or oppressive cross-examination. In the case at bar the witness did not claim this privilege but answered as shown in the statement of facts.

So in *Great W. Turn. Co. v. Loomis*, 32 N. Y. 127, it was held that the court in which a cause is tried, in the exercise of its discretion, may exclude disparaging questions not relevant to the issue, put on cross-examination for the purpose of impairing his credit; and it may in its sound discretion allow such questions where there is reason to believe they may tend to promote the ends of justice. See also *Connors v. People*, 50 N. Y. 240.

In *People v. Crapo*, 76 N. Y. 288; s. c., 32 Am. Rep. 302, these cases were commented upon and distinguished, but it is a mistake to suppose that it conflicts with them. There the defendant was on trial for larceny and was a witness in his own behalf. On cross-examination he was asked if he had ever been arrested on a charge

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of bigamy. The question was allowed but the judgment that followed was reversed, the court holding that such irrelevant questions must at least be such as clearly go to impeach the general moral character and credibility of the witness. Whether he had been charged with bigamy did not tend to impair the credibility of the prisoner as a witness. It was further added, and in this we fully concur: "The discretion which courts possess to permit questions of particular acts to be put to witnesses for the purpose of impairing their credibility, should be exercised with great caution when an accused is a witness on his own trial. He goes upon the stand under a cloud: he stands charged with a criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if in addition to this he may be subjected to a cross-examination upon every incident of his life and every charge of vice or crime which may be made against him and which has no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which would otherwise be deemed insufficient." While we fully concur in these remarks as applicable to the court trying the case, it is not claimed they furnish any reason for depriving that court of the exercise of its sound discretion.

For an abuse of that discretion, as in the case from 79 N. Y., the Appellate Court may reverse, but unless it is manifest from the whole record that such discretion has been abused to the prejudice of the party complaining, error will not lie. Thus in *Lee v. State*, 21 Ohio St. 151, it was held that: "Where an accomplice testifies as a witness, a liberal and full cross-examination for the purpose of testing the truth of his statement should be permitted; and it is error to restrict such cross-examination within unreasonable limits." The same would undoubtedly be true, where the cross-examination was extended against his objection to such an unreasonable range in matters not affecting his credibility, as to prejudice the defendant's cause.

It is true this court has held in *Bank v. Slemmons*, 34 Ohio St. 142, that it is no ground for reversal that the court refused to compel a witness on cross-examination to answer a question as to matters not relevant to the issue, for the purpose of impairing his credibility; but that is not in conflict with the case of *Lee v. State*,

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where it appeared upon the record that the question disallowed was pertinent for the purpose of testing the recollection and veracity of the witness.

In the case at bar we are unable to say that there has been such an abuse of that discretion as warrants a reversal. We by no means sanction that latitude of cross-examination sometimes indulged in, for the purpose merely of disgracing a witness, which neither relates to the issue nor seems to test the credibility of the witness. Where such is the object of a cross-examination it is the duty of the court to disallow it and to confine it to proper limits. For obvious reasons it is difficult to define these limits in general terms. The extent of such a cross-examination must be left in great measure to the discretion of the trial court, subject only to review where that discretion has been abused.

[Minor question omitted.]

OKEY, J., dissented.

Motion overruled

TELEGRAPH COMPANY V. GRISWOLD.

(37 Ohio St. 301.)

Telegraph company — negligence — stipulation to limit liability — burden proof.

A telegraph company may not stipulate for immunity for liability for its own negligence.

Where a telegraph company has inaccurately transmitted a message the burden is on it to show its freedom from fault.

ACTION of damages for negligent transmission of telegram. The telegram sent was as follows :

“WOODSTOCK, ONTARIO, *December 23, 1871.*

“*Messrs. Griswold & Dunham,*

“Will you give one fifty for twenty-five hundred at London
Answer at once, as I have only till night.

“S. W. COWPLAND.”

The dispatch was intended and understood to inquire, whether Griswold & Dunham would pay one dollar and fifty cents in gold for twenty-five hundred bushels of flaxseed, at London, Ontario.

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the parties having had a correspondence in reference to such purpose. The dispatch as delivered read "five" instead of "fifty." The proposition thus conveyed was accepted.

The dispatch was sent from Woodstock under a special agreement with the Montreal Telegraph Company as follows :

" MONTREAL TELEGRAPH COMPANY, FORM NO. 2.

" (Terms and conditions on which this and all other messages are received by this company.)

" In order to guard against, and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be repeated, by being sent back from the station at which the message is received to the station from which it is originally sent. Half the usual price will be charged for repeating the message, and while this company in good faith will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays, in the transmission or delivery, nor the non-delivery of repeated messages, beyond two hundred times the sum paid for sending the messages, unless special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid at the time of sending the message, nor will the company be responsible for any error or delay in the transmission or delivery, or for the non-delivery of any unpeated message, beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated therein, and paid for at the time. No liability is assumed for errors in cipher or obscure messages, nor is any liability assumed by this company for any error or neglect by any other company over whose lines this message may be sent to reach its destination, and this company is hereby made the agent of the sender of this message to forward it over the lines extending beyond those of this company. No agent or employee is allowed to vary these terms, or make any other verbal agreement, nor any promise at the time of performance, and no one but a superintendent is authorized to make a special agreement for insurance. These terms apply through the whole course of this message on all lines by which it may be transmitted.

" (Signed) JAMES DAKERS,
Secretary.

" (Signed) HUGH ALLEN, *President.*"

Other facts appear in the opinion. The plaintiff had judgment below.

R. P. Ranney, for plaintiff in error.

Prentice & Vorce, for defendant in error.

BOYNTON, C. J. As we have reached the conclusion that the court below did not err denying the motion for new trial founded on the alleged insufficiency of the evidence to sustain the verdict and as a review of the evidence would serve no useful purpose, only remains to consider whether the court erred in the instruction given to the jury. The first question arises on the exception that portion of the charge by which the jury were told that the special agreement under which the message was sent did not relieve the company from liability for the damages resulting from the inaccurate transmission of the message, if the mistake or error occurred through the negligence of the company or its agents. There seems to be a want of harmony in the decided cases on the point of the correctness of this instruction, and this no doubt arises, in some measure at least, from the different views taken of the nature of the employment in which telegraph companies are engaged, and to some extent from different views taken of their rights and liabilities. Courts who fully agree upon the nature of such employment, but differ as to the extent of the duties and obligations that spring therefrom. In *Parks v. Alta California Telegraph Co.*, 13 Cal. 422, the obligations of telegraph companies were held to be the same as those of common carriers, and consequently that they were in effect insurers of the safe transmission of a message, unless the transmission was interfered with by the act of God or the public enemies. An early case in England held the same doctrine. *Andrew v. Electric Tel. Co.*, 33 Eng. L. & Eq. 180. But the weight of authority both English and American is clearly the other way. *Ellis v. American Tel. Co.*, 13 Allen, 226; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446; *Bresse v. United States Tel. Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526; *New York, etc. Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, s. c., 16 Am. Rep. 437; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; *Grinnell v. Western Union Tel. Co.*, 1 Mass. 299; s. c. 18 Am. Rep. 485.

But that telegraph companies exercise a quasi public employment with duties and obligation analogous to those of a common carrier is a proposition clearly settled. The statute confers upon the

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power of eminent domain, which no one will contend could be conferred upon them, consistently with the Constitution, if they were engaged in a mere private employment or occupation by which the public interests were not affected.

They are required to receive dispatches from individuals or corporations, including other telegraph companies, and to transmit and deliver the same faithfully and impartially in the order received, except in a few specified cases, where from public considerations certain preferences may be made. S. & S. 155. These provisions, as well as the nature of the employment itself, are entirely inconsistent with the theory that the business of conducting a line of telegraph is a mere private employment as distinguished from one carried on for the benefit of the public at large. Granting this, it is however contended that because the company is not an insurer of the safe transmission of a message, and is authorized to make or adopt such regulations and by-laws for the management of the business as it may deem proper (1 S. & S. 298, § 46), it cannot be made liable to the plaintiff below beyond the amount paid for sending the message, in the face of the stipulation against liability for any error in an unrepeatd message, notwithstanding such error resulted from the negligence of the company's agents by whom the message was sent over its wires. To this proposition we do not agree. It has long been the settled law of this State, that a common carrier cannot either by special agreement with, or by notice brought home to the shipper, relieve himself from liability for the consequences of his negligence. *Davidson v. Graham*, 2 Ohio St. 131; *Railroad Company v. Curran*, 19 id. 1.

In *Graham v. Davis*, 4 Ohio St. 377,—a case involving the liability of a common carrier who claimed exemption therefrom by reason of a special contract with the shipper — it was said that “one of the strongest motives for the faithful performance of a public duty is found in the pecuniary responsibility which the carrier incurs for its failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract therefore with one to relieve him from any part of this responsibility reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral because it diminishes the motive for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have.”

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These considerations—there referred to common carriers—apply with equal force to those who furnish the means of telegraphic communication to the public. Their employment is not only public in its nature, but it has become a necessity alike to the social and commercial world.

Hence, it is as true of them, as of common carriers, that any stipulation or regulation that authorizes or enables them to secure exemption from liability for negligence, in the transmission or delivery of the message, reaches far beyond the person with whom they are dealing, and for whom the immediate service is being performed, and affects the entire public. The cases which hold that a common carrier may stipulate for immunity from liability for mere negligence, all agree that they are liable for "gross negligence." But just what this term means is not easily ascertained. There is authority for holding it to be equivalent to fraud or intentional wrong. *Jones on Bailm.* 8-46 *et seq.* But a majority of the cases would seem to hold it to be a failure to exercise ordinary care. In *Wilson v. Brett*, 11 M. & W. 113, it was said by Baron ROLFE, that he could "see no difference between gross negligence and negligence; that it was the same thing with a vituperative epithet." In *Huntou v. Dibbin*, 2 Ad. & El. (N. S.) 646, Lord DENMAN remarked, that "when we find gross negligence made the criterion to determine the liability of a common carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed however that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists." See also *Beal v. South Devon Ry. Co.*, 3 H. & C. 337; *Austin v. Manchester Ry. Co.*, 11 Eng. L. & Eq. 513; and comments of PARKE, B., in *Wyld v. Pickford*, 8 M. & W. 443. In *Duff v. Budd*, 3 Brod. & Bing 177, it was held by DALLAS, C. J., that "gross negligence is where the defendant or his servants have not taken the same care of the property as a prudent man would take of his own. And by BEST, J., in *Batson v. Davenport*, 4 B. & Ald. 21, that "they must take as much care of it as a prudent man does of his own property."

In *Grill v. General Iron Screw Collier Company*, L. R., 1 C. P. 600, gross negligence was held to be a relative term and meant "the absence of the care that was requisite under the circum-

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stances." It was the absence of such care as it was the duty of the defendant to use in the circumstances of the case.

In *Beal v. South Devon Ry. Co.*, *supra*, it was held in the case of a carrier that "gross negligence includes the want of that reasonable care, skill and expedition which may properly be expected of him." CROMPTON, J., remarking, that "for all practical purposes, the rule may be stated to be that failure to exercise reasonable care, skill and diligence, is gross negligence." To the same effect is *Briggs v. Taylor*, 28 Vt. 181, and *Shearm. & Redf. on Neg.*, § 16; all substantially agreeing with WILLES, J., in *Lord v. Midland Railway Co.*, L. R., 3 C. P. 344, that "any negligence is gross in one who undertakes a duty and fails to perform it." See also, *Griffith v. Zipperwick*, 28 Ohio St. 388; and *Pennsylvania Co. v. Miller*, 35 id. 549; s. c., 35 Am. Rep. 620.

These authorities show a strong tendency in the adjudications to break down the impracticable distinction between what is termed gross negligence, and ordinary negligence, which some of the cases hold to exist. The rule however, in this State is well settled, that one exercising a public employment is liable for failing to bring to the service he undertakes that degree of skill and care, which a careful and prudent man would under the circumstances employ; and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in the performance of the service, is contrary to public policy, and consequently illegal and void. In our opinion telegraph companies fall within the operation of this rule; and that in failing to exercise such care and skill in the transmission and delivery of messages, they become liable for the resulting consequences, notwithstanding their stipulation to the contrary. The right to make rules and regulations to govern the management of their business is expressly conferred by statute. But such rules must be reasonable, and if they fail to accord with the demands of a sound public policy they are void. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Express Co. v. Caldwell*, 21 id. 267.

We are also of the opinion that the failure to transmit and deliver the message in the form or language in which it was received, is *prima facie* negligence, for which the company is liable; and that to exonerate itself from the liability thus presumptively arising, it must show that the mistake was not attributable to its fault or negligence. This rule not only rests upon sound reason, but is well

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sustained by well considered cases. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209 ; s. c., 16 Am. Rep. 437 ; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263 ; s. c., 4 Am. Rep. 673 ; *Tyler, etc., v. W. U. Tel. Co.*, 60 Ill. 421 ; s. c., 14 Am. Rep. 38 ; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744 ; s. c., 6 Am. Rep. 165 ; *W. U. Tel. Co. v. Carew*, 15 Mich. 525 ; *De La Grange v. S. W. Tel. Co.*, 25 La. Ann. 383 ; *W. U. Tel. Co. v. Meek*, 49 Ind. 53 ; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458 ; s. c., 20 Am. Rep. 605.

If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require in many cases an impossibility, not infrequently resulting in enabling the company to evade a just liability. We are further of the opinion that the court did not err in holding, and so instructing the jury, that the message received by the company for transmission was not obscure within the meaning of the stipulation in the agreement under which the message was sent. It appeared upon its face that it related to a business transaction, a transaction involving the purchase and sale of property. The company was therefore apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver the message in the language in which it was received. *Western Union Tel. Co. v. Wenger*, 55 Penn. St. 262 ; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 265 ; s. c., 4 Am. Rep. 673 ; *Manville v. W. U. Tel. Co.*, 37 Iowa, 220 ; s. c., 18 Am. Rep. 8.

Judgment affirmed.

OKEY, J., dissented.

Van Fossen v. State.

VAN FOSSEN V. STATE.

(37 Ohio St. 317.)

Marriage — divorce — decree of another State — jurisdiction.

A decree of divorce under a statute of Colorado, authorizing divorce when neither party is domiciled there, is no defense in a prosecution for bigamy in Ohio when the parties were domiciled in the latter State at the time of the decree. *

CONVICTION of bigamy. The opinion states the case.

Evans & Evans and *Charles A. Beard*, for plaintiffs in error.

George K. Nash, attorney-general, for State.

BOYNTON, C. J. The plaintiff in error was tried and convicted of bigamy, in the court of Common Pleas of Muskingum county, at its May term of the present year, and sentenced to the penitentiary. The State gave evidence at the trial, tending to show that in March, 1850, the accused was married to Lydia J. Fowler, who was still living, and that on the 18th day of January 1881, at said county, he intermarried with one Louisa Williams. The defendant offered in evidence what purported to be a record of a decree of divorce, granted by the County Court of Larimer county, Colorado, by which it appeared that in an action apparently brought by the said Lydia J., she was divorced from the defendant at the December term of said County Court in 1880, for some marital offense alleged and found to have been committed within that State.

He also offered in evidence a copy of the General Laws of Colorado, by which a year's residence was required by the party applying for a divorce, unless the marital offense was committed within the State, or while one or both of the parties resided therein.

In reply to this evidence the State offered testimony tending to show that at the time said decree of divorce was granted, as well as at the time the action therefor was commenced, and for many years before, the defendant and his wife, Lydia J., were both residents of and domiciled in Ohio; and that neither of them had ever acquired a domicile in Colorado. Whereupon the court charged the jury,

* To same effect, *Hoad v. State* (36 Ind. 263), 28 Am. Rep. 21.

that if they found that neither the husband nor wife was domiciled in Colorado when the action for divorce was instituted or prosecuted, but that both were then domiciled in Ohio, the decree of the Colorado court was void or inoperative beyond the limits of that State. The question to be decided arises upon an exception to this instruction.

We think the instruction was correct.

The courts of one State have no jurisdiction over any marital offense, or cause of divorce wherever arising, unless one of the parties has an actual *bona fide* domicile within the State. 2 Bishop on Mar. & Div., § 144; *Cox v. Cox*, 19 Ohio St. 502; s. c., 2 Am. Rep. 415. Nor does it alter the case that the alleged marital offense was committed within the State where the divorce is sought, or that the parties submit to its jurisdiction.

What is wanting in such case is jurisdiction over the subject-matter. Marriage is a *status* exclusively regulated and controlled by the laws of the State where the relation exists. *Cheever v. Wilson*, 9 Wall. 108.

It is upon this *status* that the decree of the court operates. If the courts of one State can dissolve the marriage relation of parties both of whom are domiciled in another, for an act or offense committed while the parties were temporarily within the former State, they could as well be clothed with jurisdiction to divorce parties for an act or offense, wherever committed, provided the defendant could be found and summoned within their jurisdiction.

The doctrine is however well settled, and is founded upon the most obvious considerations of public policy, that the law of the place of the actual domicile, where both parties dwell within the same jurisdiction, governs not only as to the causes or grounds of divorce, but as to the tribunals in which the action therefor may be prosecuted. Story on Conf. Laws, § 230 a; *Strader v. Graham*, 10 How. 82, 93.

It is true that courts may be authorized to take jurisdiction where either of the parties is domiciled within the State; and a wife may acquire a domicile different from that of her husband whenever it is necessary or proper that she should have such separate domicile, and away from the domicile of marriage, or the place or State where the marital offense was committed. *Cheever v. Wilson*, *supra*; Bishop on Mar. & Div., § 128, a.

But it is held by numerous cases, and may be regarded as settled

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law, that a decree of divorce granted by another State in which neither of the parties was domiciled, is beyond the limits of such State a nullity. *Sewall v. Sewall*, 122 Mass. 156; s. c., 23 Am. Rep. 299; *Hoffman v. Hoffman*, 46 N. Y. 30; s. c., 7 Am. Rep. 299; *Hood v. State*, 56 Ind. 263; s. c., 26 Am. Rep. 21; *People v. Dawell*, 25 Mich. 247; *Litowich v. Litowich*, 19 Kans. 451; s. c., 27 Am. Rep. 145.

It is however said in argument, that the clause of the Constitution of the United States requiring full faith and credit to be "given in each State to the public acts, records and judicial proceedings of every other State" saves the Colorado decree from impeachment, and requires full force and effect to be given to it. This result quite likely would follow, if the Colorado court had acquired jurisdiction of both the parties and the subject-matter of the action. But where jurisdiction is not acquired — a fact always open to inquiry, although the record recite the facts necessary to give the same — the judgment is void, and the provision of the Constitution has no effect upon it. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas Light & Coke Co.*, 19 id. 58; *Price v. Ward*, 25 N. J. 225; *Kerr v. Kerr*, 41 N. Y. 272; *Carleton v. Bickford*, 13 Gray, 591; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 273.

The jurisdiction of the court granting the decree was therefore open to inquiry, and the jury having found neither party to the decree to have been domiciled in the State where the same was rendered, it was entirely void beyond its territorial limits.

Judgment affirmed.

 RAILROAD COMPANY V. FURNACE COMPANY.

(37 Ohio St. 321.)

Corporation — railroad — power to contract for transportation for fixed time.

A railroad company, authorized "to do all acts needful to carry into effect the objects for which it was created," including the right to exact a compensation not exceeding a specified rate for transportation of persons and property, may contract for the transportation of freight for a fixed period.

ACTION for breach of contract to transport freight at specified rates for ten years. The plaintiff had judgment below.

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R. P. Ranney and S. Burke, for plaintiff in error.

Stanley Matthews and S. O. Griswold, for defendant in error.

JOHNSON, J. A former judgment in favor of the plaintiff in error was reversed and reported in *Himrod Furnace Co. v. C. & M. Co.*, 22 Ohio St. 451. For a full statement of the pleadings, and the points there decided, we refer to that report. It is sufficient for our present purpose, to say, that it was there held, that the evidence was admissible to prove the alleged contract, and that the contract, if proved, was not void for want of mutuality of obligation between the parties nor for want of a sufficient consideration.

On the last trial, this contract was proved as alleged, and a verdict and judgment resulted which it is sought to reverse. The judgment, as to all overcharges paid by the plaintiff below the judgment here, has, after a careful consideration of all the facts made, been affirmed, a *remittitur* of all overcharges paid to the plaintiff in error having been entered. Among the cases assigned is one we have reserved for report.

It is now claimed, that this contract for transportation, though not void for want of mutuality, nor for want of a sufficient consideration to support it, is so for want of capacity of the corporation to make it. It is insisted with earnestness and marked ability that the laws of Ohio do not confer upon the directors of a railway corporation the power to make such a contract for a term of years which will bind that, or any future board of directors. The ground is that "the franchise conferred upon railway corporations by the agents of the State, for the operation of a public highway, to transport persons and property and to receive a reasonable compensation for it, was given to be used for the equal benefit of those to whom it equally belonged, and not to be abused; to be preserved in its integrity, for use from time to time, as the exigencies of the corporation and the public good might require, and not to be frittered away by alienation or contract in favor of individuals or classes, to build up monopolies or other interests. * * * To hold this judgment and discretion of the directors in performing their duties, under the authority of this franchise, might be suspended for periods of ten years in succession, would certainly be attended with strange if not disastrous consequences." Judge Ranney's brief.

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The substance of this claim is, that a board of directors of a railway corporation have no authority to bind the corporation for a term of years, or for any future time, however short, which in any manner abridges or suspends the discretion of the same or any future board, to fix rates such as "the exigencies of the corporation and the public good might require,"—in short, that such a contract is *ultra vires*, notwithstanding the contract, when made is based upon a sufficient and valuable consideration received by the corporation, and was in all respects fair and reasonable.

In the discussion of this proposition, it is of the first importance that it should be carefully distinguished from other questions of somewhat kindred nature, which the learned counsel have blended with it in the argument.

∴ It is distinguishable from that class of contracts sometimes made by common carriers, which are held to be void because they unjustly discriminate in favor of one shipper over another. The invalidity of such contracts arises from the fact, that it is against public policy to allow any common carrier, whether an individual, or a corporation, to give an illegal preference to one shipper over another, for the same kind and amount of service. When such is the nature of the contract for transportation, its validity or invalidity does not depend upon the individual or corporate character of the carrier, but upon the provisions of the contract itself, unless the terms of the charter of the corporation limits its power to contract in this respect.

These contracts are not enforceable because they are against public policy, and not because they are *ultra vires*. An act of a corporation is *ultra vires* when it is beyond the chartered powers of the corporation, and is therefore said to be void. It may also be void because it is against public policy as declared by statute, or the fundamental law, or for any reason that would make a like contract of an individual void. In the case before us, the court charged the jury as to what constituted an invalid contract on account of discrimination. That charge was not prejudicial to the plaintiff in error. The jury found as a fact that this contract was not obnoxious to this objection. A careful review of the evidence satisfies us that the jury were warranted in so finding. This eliminates from the problem the question of the invalidity of this contract on the ground of discrimination.

2. That such a contract is not void for want of a sufficient con-

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sideration to support the promise of the railroad company, nor for want of mutuality of obligation between the parties, was settled in his case, when it was here before. *Himrod Furnace Co. v. C. & M. R. R. Co.*, 22 Ohio St. 451. We see no reason to disturb that decision.

3. This is not a question of the abuse, by the board of directors, of the judgment and discretion vested in them by law, to contract for transportation. Neither the stockholders nor the public authorities are here complaining. It is not even insisted that the rates fixed by the contract are not reasonable and advantageous to the railroad company, nor that the board of directors did not act in perfect good faith.

In view of the evidence and the verdict, we have the right to assume that the contract was to the mutual advantage of both parties, that it was made in good faith, and that its performance for the whole term would not have been injurious to the interest of the stockholders, or in any way suspend or abridge the powers conferred to discharge the duties the corporation owed to the public as a common carrier, to carry for all on equal terms.

4. Neither does the length of time the contract has to run affect the question of power. A contract for a less time than ten years, or indeed for any time, is invalid if there is no corporate power to make time contracts for transportation. If the power exists to make a time contract for transportation, the discretion thus vested may be abused to the prejudice of the corporation and its stockholders. For such abuse of vested powers, the law furnishes a remedy in proper cases, as in other cases of a breach of trust by boards of directors of corporations. So it might by such a contract grant a monopoly to one shipper, and thus render it incapable of carrying for others. It is not claimed that the existence of this contract impairs the capacity of the company to carry for others as its public duty requires. We are thus brought to the question, whether the board of directors had the power or capacity to make a contract to transport property for a fixed time. This depends upon its chartered powers.

The Cleveland & Mahoning Railroad Company was chartered February 22, 1848, with authority to construct a railroad from Cleveland to Warren, Trumbull county, with the right to extend it east to the State line. The company was to have "all the powers and be subject to all the restrictions and provisions of the 'act

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regulating railroad companies,' passed February 11, 1848." 1 Ohio Railway Rep. 545. By the act of February 11, 1848, this corporation was endowed with a corporate capacity "to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation ; * * * and do all needful acts to carry into effect the object for which it was created ; and such company shall possess all the powers and be subject to all the rules and restrictions provided by this act, except so far as modified by the special act incorporating the same."

By section 7, the directors are vested with the exercise of these corporate powers, and are to "transact all business of the corporation."

By section 12, "such corporation may demand and receive for the transportation of passengers on said road, not exceeding three and one-half cents per mile, and for the transportation of property not exceeding five cents per ton per mile, when the same is to be transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles such reasonable rate as may be from time to time fixed by said company." 1 Ohio Railway Rep. 14-17.

In this act the power "to contract and be contracted with, * * * and to do all needful acts to carry into effect the objects for which it was created" clearly embraces the power to transport persons and property as a common carrier for hire.

This obviously includes the right to charge and collect compensation, at a rate not exceeding the maximum fixed by section 12 of the statute.

Substantially the same provisions are found in the general act of 1852, relating to railroads. The object for which the charter was granted was to construct, maintain and operate a railroad for the individual benefit of the stockholders, as well as for the public benefit. Here there is an express power to make contracts for transportation and to agree with the shipper upon rates. The only limitation which the statute imposes is that the rates shall not exceed the maximum fixed by section 12 of the act.

Every undertaking to carry persons or property rests upon contract, express or implied. It may be the result of an express contract, agreed upon by the parties, or it may arise by implication of law.

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In either case it is a contract which gives the company the right to demand and receive compensation.

The power that exists to make a contract for a single shipment will authorize a contract for a series of shipments or for a period of time.

Whether the rates be fixed by a schedule and posted up, or by separate contract in each case, is not material. In either way, it is a lawful exercise of the power to contract with the shipper for a compensation.

We fully agree that this corporation is the creature of the law, and that being such, "it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence" (*Dartmouth College v. Woodward*, 4 Wheat. 518, 636); and that grants of power to individuals to construct, maintain and operate a railroad, as a body corporate, which are primarily designed for the profit of its stockholders, should receive a strict construction. "The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." *Beatty v. Knowler*, 4 Pet. 162. This does not exclude the right to use any appropriate means to carry into effect the powers expressly granted, or necessarily implied. There is a clear line of distinction between cases involving the mode of exercising granted powers, and those where the power to do the act is wanting. If the power to do an act is clearly conferred, either by express grant or by necessary implication, the corporation may adopt any appropriate means, not expressly forbidden. The mode or manner in which the act shall be done is, in the absence of limitations imposed by the charter, left to the sound discretion of the corporate authority.

In this case the power to make contracts for transportation cannot be questioned.

Whether such contracts shall be made by a published tariff of rates, or as expressed in the bill of lading which accompanies each shipment, or by a general contract with each shipper for a longer or shorter term, rests, we think, in the sound discretion of the board of directors. If either method is resorted to, it is but the exercise of a power expressly granted, which is necessary and essential to carry out one of the leading objects of the corporation, namely to earn money for the proprietors. If this were not so, railroad corporations would possess immunities that no individual has.

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A contract made to-day might be repudiated to-morrow, or even while goods are in transit upon agreed rates, under the plea that the exigencies of the corporation require it. If such a principle be sound no reason exists why it should not apply to all executory contracts which the corporation is authorized to make, as well as to contracts for transportation.

In thus holding we do not controvert the principle that the company cannot alienate its franchise or property, which are essential to the performance of any duty it owes to the public. This corporation is clothed with powers and franchises of both a public and private nature. It could not without express authority divest itself of its power to perform all obligations it owed to the public or to the State. It could not do this either by mis-user, non-user or by contract, without liability to the State or to those having the right to demand their performance. As a private corporation, it also possessed powers and franchises, such as the power to contract and be contracted with, and generally to do all acts needful to carry out the object of the incorporation. Included in this class of powers is that of demanding and receiving compensation for transportation. Its power to contract in this respect is limited by the maximum rate fixed by statute, also by the rule above stated, that it cannot impair ability to perform its public duties. To make a contract for transportation binding for a greater time than a single shipment, is within the scope of its authority if it is otherwise valid; and if the power to perform all the duties it owes to the public are not impaired or abridged.

An examination of the cases cited and relied on in the argument will show that they are all cases where it has been held there was a want of power to do the act, and not where the exercise of a discretion in doing an act is expressly authorized.

Thus in *Thomas v. West Jersey R. Co.*, 101 U. S. 71, it was held that a lease by a railroad company of all its road, rolling-stock and franchises, for which no authority is given in the charter is *ultra vires* and void; that the general power to contract with other companies for the mutual transfer of goods and passengers did not include the power to lease. It was further held that any contract by which the company renders itself incapable of performing its duties to the public, or which attempts to absolve itself from its obligation without the consent of the State, violates its charter, and is forbidden by public policy.

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In this we concur but cannot see its application to the case at bar. It is not even pretended that this railroad has by this contract rendered itself incapable of performing its duties to the public, or that it has attempted to absolve itself from any obligation to the State, or to the public as a public carrier, under the act of incorporation.

State v. Consolidation Coal Co., 46 Md. 1, was decided on the same principle, where it was held that the power to sell and convey all its property and franchises, and thus escape its obligations to the public, could only be conferred by express legislation. To the same effect are *Black v. Delaware & Raritan Canal Co.*, 22 N. J. 130; s. c., 24 id. 455; *Middlesex R. R. Co. v. Boston & Chelsea R. R. Co.*, 115 Mass. 347; *Richardson v. Sibley*, 11 Allen, 65.

These and other cases that might be cited rest upon the principle that the corporation owes duties to the public; that the franchises granted to it impose a trust, and that without express authority it cannot disable itself from the performance of these duties or the faithful execution of the trust.

For aught that appears or is even suggested, the plaintiff in error has performed all its corporate duties to the public, and has faithfully discharged the trust reposed in it by the grant of its franchises to the satisfaction of the State and of the public. The existence of this ten-year contract has not, so far as we are advised, incapacitated the corporation from the performance of all such duties and trusts.

Neither the State nor the public who are benefited by this public highway, nor the stockholders, are complaining. Why should the corporation be allowed to absolve itself from a contract, fairly made, of mutual obligation and advantages, when made, supported by a valuable consideration, received in great part and free from any discrimination, simply because it may prove less profitable than was anticipated?

What effect such a contract would have on the rights of other shippers we have not considered, as they are not here complaining. We hold that the making of this contract was in the exercise of the sound discretion of the board of directors granted to them in the charter of the company and is not *ultra vires* and void.

Judgment affirmed.

Fanning v. Insurance Company.

FANNING V. INSURANCE COMPANY.

(37 Ohio St. 339.)

Corporation — oral promise to subscribe for stock.

An oral promise, pending the organization of a corporation, to take shares of the stock, does not constitute the promisor a stockholder or member, and will not support a note given by him to pay for such shares.

ACTION on a promissory note given for capital stock. The head-note shows the point. The plaintiff had judgment below.

Arnold Green, for plaintiff in error.

W. S. Kerrish and *S. Burke*, for defendant in error.

JOHNSON, J. [Minor matter omitted.] Did the court err in its charge that the verbal agreement to take stock created an indebtedness to the corporation?

It appeared that the certificate of incorporation was dated March 2, 1870. This charter was obtained under the act of April 15, 1867 (S. & S. 205). Under this statute any number of persons, as required by the act, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," passed May, 1, 1852, may form an insurance company other than life insurance by giving notice of their intention so to do, four weeks in a public newspaper in the county and by making a certificate specifying the name of the company, its object, the amount of capital and place of business, which on being properly executed shall be filed with the secretary of State. If approved as required by section 2 of the act it shall be recorded and copied as provided by section 2 of the act of 1852; "and said persons when incorporated, and having in all respects complied with the provisions of this act, are hereby authorized to carry on the business of insurance as named in said certificate of incorporation," etc. By section 4 the persons named in the certificate, or a majority of them, shall be commissioners, to open books for the subscription of stock * * * and shall keep the same open until the full amount specified in the certificate is subscribed. Section 5 provides for an election of a board of directors after the stock is all taken.

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It is a fact in this case that this note and mortgage were taken before the corporation was authorized to elect directors and officers. It also appears that the note and mortgage were received and counted as part of the amount of stock necessary to make the amount to be obtained, before holding such an election.

Waiving all questions arising out of alleged irregularities in obtaining the requisite amount of capital stock to authorize the company to organize, or make loans, let us inquire what validity there was in the promise of Mrs. Fanning to pay for capital stock, based upon a verbal agreement made with an agent of the company, to take that amount of stock.

In the manner in which the charge was given on this point, the jury might, and probably did, find in favor of the plaintiff below, independent of any question of ratification or estoppel. There was evidence tending to show that Mrs. Fanning had, by her acts, estopped herself from taking advantage of any defects in the organization, or any informality in the agreement; but this charge, that a verbal agreement to take stock was sufficient to create an indebtedness, left the jury free to find for the plaintiff, without passing upon the question of estoppel.

The note was a promise to pay for stock which the maker had verbally agreed to take. Had Mrs. Fanning been a *subscriber* to the stock she would have been entitled to be treated as a stockholder. This would have been a sufficient consideration to have supported a promise either *express* or *implied* to pay for the stock. The agreement must be mutual and binding upon both parties. If the corporation are not bound to treat her as a stockholder, her promise to pay is a *nudum pactum*, for want of a mutual promise by the corporation to award her the stock. In the absence of proof that she had received the stock, or of any other consideration to support her promise, or of any acts by her, creating an estoppel, her promise to pay for stock for which she has not subscribed, and which the corporation is not bound to deliver at the proper time, is without a sufficient consideration to support it.

The Constitution of the State provides for the individual liability of stockholders, and the statute prescribes the mode by which those who constitute themselves such, preliminary to an organization of the corporation, shall become stockholders and entitled to rights as such. The law contemplates such proceedings as will constitute the members of the proposed corporation stockholders by requiring

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them to be subscribers to the stock. By the act of thus becoming stockholders, they acquire an interest in the franchises and business of the company, and are subject to all the liabilities of stockholders, including the obligation to pay for the stock subscribed. If this obligation is not mutual and equally binding upon the corporation, the promise to pay is not supported by a sufficient consideration. The criterion of liability is whether any act has been done by which the corporation is compelled to recognize the promisor as a stockholder. If the corporation was not bound, by what took place, to recognize Mrs. Fanning as a stockholder, neither is she bound to pay for stock. Angell & Ames on Corp., ch. 15, *et seq.*; Thompson on Liability of Stockholders, §§ 105–110; *Valk v. Crandall*, 1 Sandf. Ch. 179; *Tonica v. Petersburg R. R. Co.*, 21 Ill. 96; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Spear v. Crawford*, 14 Wend. 20; *Selma & Tenn. R. R. v. Tipton*, 5 Ala. 787; *Phillips Limerick Academy v. Davis*, 11 Mass. 113 (6 Am. Dec. 162); *New Bedford v. Adams*, 8 Mass. 138 (5 Am. Dec. 81); *Essex Turnpike Co. v. Collins*, 8 Mass. 292; *Lake Ontario, A. & N. Y. R. R. Co. v. Mason*, 16 N. Y. 451; *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188; *P. & S. R. R. Co. v. Gazzam*, 32 Penn. St. 340; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

A careful consideration of the statutes authorizing the formation of such corporations, as well as of the authorities cited, requires us to hold that a mere verbal agreement to take stock in a company whose promoters are engaged in securing the amount of stock required before it can organize, does not constitute the promisor a member of such corporation, and is without a sufficient consideration to support it.

Judgment reversed.

HAMET V. LETCHER.

(37 Ohio St. 356.)

Sale — false representation of agency — title.

H., relying on the representations of R. that he was the agent of L., agreed to sell chattels of his to L., on credit, delivered them to L., and received part of the price from R. R. was not such agent and had no authority to purchase for L. L. bought the chattels from R. without knowledge of the fraud. *Held*, that title did not pass, and that H. could recover their value of L. less the amount paid by R.

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ACTION for value of personal property. The head-note states the case. The defendant had judgment below.

Pratt & Bentley, and Sheldon & Boothman, for plaintiffs in error.

J. Pillars and S. E. Blakeslee, for defendants in error.

OKEE, C. J. A remark made in *Cundy v. Lindsay*, L. R., 3 App. Cas. 459, is quite applicable here. There it was said, "You have in this case to discharge a duty which is always a disagreeable one for any court, namely to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practiced upon both of them must fall." But our duty in this case, as in all others, is simply to declare the law. The only question here is, whether in view of the facts set forth in the statement of the case, the property in the hogs passed from Hamet. If it did, the judgments in the courts below are right; if it did not, they are wrong. In the decision of cases of this sort, difficult questions are sometimes presented; but the principles upon which they should be determined are firmly established.

If Rohner had offered to buy the hogs for himself, and Hamet had agreed to sell them to him, and had made delivery thereof in pursuance of such sale, the property in the hogs would have passed to Rohner, although the sale had been induced solely by fraudulent representations made by Rohner. That would have been a *de facto* contract; and while it might have been avoided by Hamet, by reason of the fraud, while the property remained in the possession of Rohner, yet if Rohner had sold the hogs, before the contract was thus avoided, to Letcher & Co., they having no knowledge of the fraud, the latter would have acquired a perfect title. *Rowley v. Bigelow*, 12 Pick. 307 (23 Am. Dec. 607); *Hoffman v. Noble*, 6 Met. 68; *Schaeffer v. Macqueen*, 1 Disney, 453; *Attenborough v. Dock Co.*, 3 C. P. D. 450; *Babcock v. Lawson*, 4 Q. B. D. 394; affirmed, 5 id. 284. In a case where this principle was enforced (*Moyce v. Newington*, 4 Q. B. D. 32), **COCKBURN, C. J.**, said: "the reasoning on which this conclusion is based may not appear altogether consistent with principle, but agreeing in the result, we should prefer to adopt the view of the American courts, as stated in the case of *Root v. French*, 13 Wend. 570 (28 Am. Dec. 482), a

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case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud."

But this was not a sale to Rohner in his own right. He made no proposition to buy in any other way than as agent. Hamet did not agree to sell to any other than Letcher & Co., who never agreed to buy of him, and he was induced to sell solely by reason of Rohner's representation that he was such agent, which representation was wholly false, as Rohner well knew. This therefore was not a contract voidable merely, but an agreement wholly void; and under the circumstances, the property in the hogs never passed from Hamet. Hence, applying the maxim that no one can transfer a greater right or better title than he himself possesses (*Roland v. Gundy*, 5 Ohio, 202), it necessarily follows that Letcher & Co. are liable as for a conversion. *Moody v. Blake*, 117 Mass. 23; *Barker v. Dinsmore*, 72 Penn. St. 427; s. c., 13 Am. Rep. 697; *Saltus v. Everett*, 20 Wend. 267 (32 Am. Dec. 541); *Fawcett v. Osborn*, 32 Ill. 411; *Hardman v. Booth*, 1 H. & C. 803; *Higgons v. Burton*, 26 L. J. Ex. 342; *Kingsford v. Merry*, 1 H. & N. 503; *Hollins v. Fowler*, L. R., 7 Q. B. 616; affirmed, L. R., 7 App. 757; *In re Reed*, 3 Ch. D. 123; *Lickbarrow v. Mason*, 1 Smith's L. C., 2 pt., 1195; *Cundy v. Lindsay*, *supra*.

Perhaps the principle here involved was more fully considered in the latter case (*Cundy v. Lindsay*) than in any other. The facts briefly stated were as follows: Lindsay & Co. were manufacturers of linen goods at Belfast, Ireland. Alfred Blenkarn, who occupied a room in a house looking into Wood street, Cheapside, wrote to Lindsay & Co., proposing to purchase a certain quantity of such goods, and in his letter used this address, "37 Wood street, Cheapside," and signed the letters (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm known to Lindsay & Co., of the name, "W. Blenkiron & Co.," carrying on business at 123 Wood street. Lindsay & Co. sent letters, and afterward supplied goods, being all addressed to "Messrs. Blenkiron & Co., 37 Wood street," which they supposed was the address of the respectable

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firm above mentioned. The goods were received by Alfred Blenkarn at that place of which goods he sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who had no knowledge of the fraud, and who resold them in the ordinary course of their trade.

On the hearing of the case before the judges of the Queen's Bench (*Lindsay v. Cundy*, 1 Q. B. D. 348), in 1876, it was held that the property in the goods passed to Alfred Blenkarn, and consequently that Lindsay & Co. could not maintain an action against the Messrs. Cundy, innocent purchasers. But that decision was reversed the next year, in the Court of Appeals (*Lindsay v. Cundy*, 3 Q. B. D. 96), and the latter decision was affirmed in the House of Lords 1878. *Cundy v. Lindsay, supra*. That was a stronger case for the innocent purchaser than this case. Indeed on the latter hearing, Mr. Benjamin, who argued the case for the Messrs. Cundy, admitted that under circumstances such as are presented in this case, the property would not pass to the fraudulent vendee.

The circumstance that Hamet intended that Letcher & Co. should have the hogs is of no importance. He never intended they should acquire title from any other than himself, nor do they make any claim to such property under any purchase they made from him. The case would be in no material respect different if Rohner had represented to Hamet that he was agent of some firm other than Letcher & Co. Nor does the payment by Rohner of \$55 on the agreed price have any other effect on the right to recover than to reduce the amount for which judgment should be rendered.

Counsel for defendants in error rely on *Stoddard v. Ham*, 129 Mass. 383 ; s. c., 37 Am. Rep. 369, the syllabus of which is as follows: "If A. sells goods to B., who sells them to C., the fact that A. supposed he was selling the goods to C. through B. as his agent, and would not have sold them to B. on his sole credit, will not entitle A. to maintain an action against C. for a conversion of the goods." But the decision lends no support to the defendants in error. There it appeared that Stoddard & Co., the plaintiffs, had sold bricks to Leonard, believing that he was acting as agent for Ham, the defendant ; but Leonard was acting for himself, and subsequently he sold the bricks to Ham. It was expressly found as a fact that "Leonard was not guilty of any false representations as to agency, and it was a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing." Of course, Stoddard & Co. failed in the action.

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Defendants in error also rely on a remark of McILVAINE, J., delivering the opinion in *Dean v. Yates*, 22 Ohio St. 388, as to the effect of delivery of possession to a fraudulent vendee. But nothing was determined in that case inconsistent with the conclusion stated in this case: On the contrary, *Dean v. Yates* is entirely consistent with our decision of this case, and supports it, as it is likewise supported by *Sanders v. Keber*, 28 Ohio St. 630, also cited by defendants in error.

In the finding of facts in the Court of Common Pleas, it was ascertained, that if Hamet was entitled to recover, the amount then (June 11, 1877) due to him, deducting the sum paid by Rohner, was \$137.28. The judgment of the District Court and Court of Common Pleas will be reversed, and judgment will be rendered in favor of Hamet and against the defendants in error for that sum, with interest from June 11, 1877, and costs.

Judgment reversed.

RUSSELL V. SUNBURY.

(87 Ohio St. 872.)

Abatement — action for wrongfully causing death — death of wrong-doer.

The statutory right of action for wrongfully causing death of a person abates by the death of the wrong-doer before action.

ACTION of damages for wrongfully killing plaintiff's intestate. The defendant was administrator of the wrong-doer. The plaintiff had judgment below.

Hall Brothers, for plaintiff in error.

N. L. Chaffee, for defendant in error.

JOHNSON, J. The petition alleges that the death of Anderson was caused by Turner's wrongful act, and that he died before this action was commenced.

Did the right to institute and prosecute this action survive against the personal representative of Turner? This depends on a construction of the act requiring compensation for causing death by

wrongful act, neglect or default (2 S. & C. 1139), and of section 398 of the Code of Civil Procedure.

This act was passed March 25, 1851. It was an innovation upon the common law in allowing an action for damages resulting from death, and in authorizing an action in favor of the personal representative to recover such damages. The right to maintain such an action by the personal representative of the deceased, for causing his death, is authorized against the person who, or the corporation which, would have been liable if death had not ensued, whenever the death shall have been caused by the wrongful act, neglect or default of such person or corporation. The statute itself gives the test of the right to such an action. If the party injured could, had death not ensued, have recovered for his injuries, then when death does ensue, his personal representative may recover. The foundation of the former action is the personal injuries to himself by the wrongful act, neglect or default of defendant. The same injuries causing death are the foundation for the right of action in favor of his personal representative. The amount recovered is for the exclusive benefit of his widow and next of kin, resulting from the death. In this action the measure of damages is determined by the extent of the personal injury, enhanced, it may be, by punitive damages, while the measure of damages in the latter action is the pecuniary injury to the widow and next of kin, the loss to them caused by his death. In each case, the action is in form *ex delicto*.

In the case at bar it arises from a wrongful act and not from neglect or default. It belongs to the class of actions classified at common law as injuries to the person, as distinguished from injuries to the estate. By the express terms of the statute, the person who, or the corporation which, is guilty, is made liable, and not his heirs or personal representatives.

At common law, all actions in form *ex delicto*, for the recovery of damages, abated by the death of either party. This rule embraced injuries to person, to personal property and to real estate.

By the statute 4 Edw. 3, ch. 7, this rule was so modified as to give an action in favor of a personal representative for injuries to personal property. This statute may be regarded as part of the common law of this State.

By statutes 3 and 4 W. 4, ch. 42, § 3, the common-law rule was further modified by giving an action in favor of the personal repre-

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representative for injuries to real estate, and against personal representatives for injuries to real or personal property. But neither of these statutes changed the common-law rule as to injuries to the person.

When the act of March 25, 1851, was enacted, the civil practice act of 1831, with amendments, was in force in Ohio, and to a certain extent changed the common law as to abatements of actions. It provided that no pending action in any court (except for libel, slander, malicious prosecution, assault, assault and battery, actions on the case for nuisance, or against justices of the peace), shall abate by the death of either or both parties. Sections 62, 64, act of 1831, Swan (ed. 1840), p. 667.

By section 74 of the same act (id. 669), if any person have a right to commence and maintain an action of trespass, or trespass on the case for mesne profits, or for any injury to his estate, real or personal, or for deceit or fraud committed in the sale thereof; or if any person liable to either of said actions shall die before such action is brought, the cause of action shall survive.

By the act of 1845, the rule as to pending action was extended so as to provide that no action founded on a tort should abate by the death of the plaintiff. 43 Ohio L. 114, § 2.

In none of these statutes was any provision made to modify the common-law rule that for injuries to the person arising *ex delicto*, the right to bring the action abated by the death of defendant.

Section 398 of the Civil Code is in terms the same as section 74 of the act of 1831. It provides, that in addition to the actions which survive at common law, causes of action for mesne profits, or for injury to real or personal estate, or for deceit or fraud, shall also survive, and the action may be brought notwithstanding the death of the person entitled or liable to the same. This relates to causes of action or the right to commence and maintain actions, and not to pending actions.

Section 399 of the Code relates to pending actions, and is the same in terms as section 64 of the act of 1831. As the case at bar depends upon section 398, the question is, does the act of 1851 give a right of action for injuries to the estate real or personal, within the meaning of those terms used in the section?

The damages recovered are for the pecuniary injury to the widow or next of kin, and not for injury to his estate. The legal injury for which a recovery may be had is that done to them by causing the death of the person, standing in a certain relation to them.

His personal injuries for which an action would lie, if death had not ensued, are the basis of his recovery, while their injury, for which damages commensurate with their pecuniary loss resulting from his death is recoverable under the act of 1851, is the basis of their action. In each the liability arises from the same wrongful act, neglect or default, but in his action the amount of recovery is measured by his personal injuries, including pain and suffering, as well as loss of time, expenses of cure, and it may be, exemplary damages ; while in theirs, the amount of recovery depends on none of these things, but on their pecuniary loss resulting from his death.

The law assumes that there is such a pecuniary loss to the widow and next of kin, and awards to them damages therefor.

The petition alleges that defendant, by his wrongful act, injured the estate of Anderson, but as the act gives the remedy not to his estate, but to his widow and next of kin, this cannot be so. The personal representative is only a trustee for them, to recover and distribute the damages they are entitled to recover. The clause, "or for an injury to the real and personal estate," found in section 398, and in the act of 1831, is borrowed from the classification known to the common law, to distinguish such injuries and rights of action from those to the personal or real estate.

We find the same terms in the act of 3 & 4 W. 4, ch. 42. By that act injuries to the personal or real estate survive against the representative of the defendant. It recites the fact that there is no remedy for injuries to real estate of a deceased person committed in his life-time, nor for certain wrongs done by a person deceased, in his life-time, to another, in respect to his property, real or personal, and among other things provides for an action against the personal representative of a deceased wrong-doer in respect to injuries to such property. 1 Ch. Plead. 79.

In using this phrase, "injury to the real or personal estate," the legislature is presumed to have used it in its well established sense, as distinguishing torts to property from injuries to person.

We conclude therefore, that section 398 of the Code does not prevent the abatement of a right of action for damages to the person. As the right of action given by the statute is for the pecuniary loss to the widow and next of kin, the legal injury is the one sustained by them, and not by him or by his estate. It is not an injury to their estate. It is based upon the relation the deceased bore to them, and on his duty to provide for and support them. If there

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is no one occupying the relation of widow or next of kin no right of action accrues.

It follows that the injury caused to them by the death is a personal injury to them and not an injury to their estate.

We have been referred to the case of *Yertore v. Wiswall*, 16 How. Pr. 8, as an authority to the effect, that the New York statute, similar to ours, creates a *property* interest in the life of deceased, which survives under the New York statutes.

That case arose out of *negligence* in the performance of an implied *contract*, and not, as in this case, from a wrongful act which was purely *ex delicto*. Again the New York statute as to survivorship is different in terms.

But with the view of the judge who delivered the opinion, holding that their statute gave a vested *property interest* to the widow and next of kin in the life, or rather in the death, of deceased, we do not concur. To so hold is a confounding of legal terms and distinctions.

Death gives this right of action under the statute, while at common law death terminated the right of the party injured.

The statute gives a right to maintain an action for loss occasioned by death. It does not vest in the widow and next of kin a property interest in the deceased. To say that the remedy is in its nature *ex contractu* when the act is a naked trespass, or that the injury is to the estate of the deceased or of their estate, is to confound the well-settled distinction between injuries to the person and injuries to the estate.

Whatever may be the rule, where the death is caused by neglect or default while the defendant is in the performance of a contract, express or implied, we hold that in this case, when the death is caused solely by the wrongful act of defendant's intestate, the right to commence and maintain the action abated by the death of Turner.

The demurrer to the petition should have been sustained and the action dismissed.

Judgment accordingly.

BELL v. MCCONNELL.

(37 Ohio St. 306.)

Agency — double — compensation.

One acting as broker of both parties to an exchange of lands may not recover compensation from either, even upon an express promise, without clearly showing that each had full knowledge of all the circumstances and assented to the double employment.

ACTION upon an express agreement for commissions as broker upon an exchange of lands between defendants and Neal. The defendant answered that the plaintiff, without his knowledge, had been employed also by Neal to sell or exchange his lands in question upon an agreed compensation. The plaintiff replied that Neal knew of his employment by the defendant. The plaintiff requested the court to charge the jury as follows :

“That if the jury find from the evidence that said defendants employed said plaintiff to act as their agent in the exchange of the property mentioned and described in the petition for the farm of Mr. Neal, located in said township of Boardman, or employed him to aid and assist in such exchange, and agreed to pay him three per cent commission on said property, and at the same time knew that said plaintiff was the agent of said Neal for the sale or exchange of said farm, and that he was acting as his agent, and that said defendant assented thereto and agreed to pay said commission, and that said Neal knew that said plaintiff was acting agent of said defendant in said exchange, and assented thereto, and agreed to pay said plaintiff the commission stipulated in the written contract of agency, said plaintiff would be entitled to recover in this case,” but the court refused, and charged as follows :

“That if you find that Neal employed plaintiff to sell or exchange his farm in Boardman for cash or property, and agreed to pay him for such services, and if, while so employed, defendant Bell and others employed plaintiff to find a purchaser for their (defendants’) city property, or one who would exchange country property for it, and if plaintiff’s duty was simply to bring the buyer and seller together, and for that service defendants agreed to pay plaintiff a fixed amount, and if plaintiff performed that service, the defendants are bound in law to pay said amount so fixed, even

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though plaintiff was acting as agent for the party — in this case Neal — so introduced.

“ But I say to you, if the contract between plaintiff and defendants was, that plaintiff should sell for, or assist the defendants in selling or exchanging their property, and did so sell or exchange defendants’ property, or assist them in selling it to, or exchanging it with said Neal, while he was also acting for Neal, or assisting him in the same sale or exchange, under a contract with said Neal for pay on the part of said Neal for such service so rendered him, then plaintiff is not entitled to your verdict in this case, even though both Bells and Neal were aware of, and assented to said plaintiff’s employment and acts in the premises.”

The plaintiff had judgment at the trial, which was reversed by the District Court.

R. B. Murray, for plaintiff in error.

George F. Arrel, for defendant in error.

McILVAINE, J. This case presents the single question: Can a real estate broker, who assumes to aid both contracting parties in making an exchange of real estate, recover compensation for his services from either, upon an express promise to pay in a case where each principal had full knowledge of and assented to the double employment?

It has been decided (*Rupp v. Sampson*, 16 Gray, 398, and *Siegel v. Gould*, 7 Lans. 177), and is not doubted that such broker may recover from both or either where his employment was merely to bring the parties together; and it is equally clear, both upon principle and authority, that in case of such double employment he can recover from neither, where his employment by either is concealed from or not assented to by the other. Several reasons may be given for this rule. In law as in morals, it may be stated that as a principle no servant can serve two masters, for either he will hate the one and love the other or else he will hold to the one and despise the other. Luke, 16, 13. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion. The agent cannot divide this duty and give part to another. Therefore by engaging with the second he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable

himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer who is ignorant of the first engagement. And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. It is no answer to say that the second employer having knowledge of the first employment should be held liable on his promise, because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals and both parties thereto being in *pari delicto*, the law will leave them as it finds them. *Ex dolo malo non oritur actio*.

The non-liability of the second employer having knowledge of the first employment has been maintained in the following cases: *Farnsworth v. Hemmer*, 1 Allen, 494; *Walker v. Osgood*, 98 Mass. 348; *Smith v. Townsend*, 109 id. 500; *Rice v. Wood*, 113 id. 133; s. c., 18 Am. Rep. 459; *Bollman v. Loomis*, 41 Conn. 581; *Everhart v. Searle*, 71 Penn. St. 256; *Morrison v. Thompson*, L. R., 9 Q. B. 480. But in each of these cases it is strongly intimated if not distinctly announced, that a recovery may be had by such agent when he acted with the knowledge and consent of both principals. In *Lynch v. Fallon*, 11 R. I. 311; s. c., 23 Am. Rep. 458, the same general doctrine is held and it is said that a broker, acting at once for both vendor and purchaser, assumes a double agency disapproved of by law, and which if exercised without the full knowledge and free consent of both parties is not to be tolerated. The same in *Meyer v. Hanchett*, 43 Wis. 246, wherein the question whether such double agency is consistent with public policy, though exercised with the consent of both parties, is left undecided, but it is decided that mere knowledge of such double agency without actual consent on the part of the principals will not entitle the agent to commissions.

The validity of such contracts of double agency where all the principals were fully advised and consented to the double employment, was more directly before the courts and affirmed in the following cases: *Rowe v. Stevens*, 35 N. Y. Super. Ct. 189; 53 N. Y. 621; *Alexander v. N. W. C. University*, 57 Ind. 466; *Jorlin v. Cowee*, 56 N. Y. 626; *Adams Mining Co. v. Senter*, 26 Mich. 73;

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Fitzsimmons v. Southwestern Ex. Co., 40 Ga. 330; s. c., 2 Am. Rep. 577; *Rolling Stock Co. v. Railroad*, 34 Ohio St. 450; *Pugley v. Murray*, 4 E. D. Smith, 245. See also note by Bennett to *Lynch v. Fallon*, 16 Am. L. Reg. 333.

Raisin v. Clark, 41 Md. 158, holds the contrary doctrine, if knowledge and consent on the part of the first employer is to be regarded as fully proved. Other cases bearing more or less directly on the point might be cited; but enough are given to show a want of harmony in the decisions; yet we think the decided current of authority is in favor of the validity of such contracts where the consent of both principals to such double agency is clearly proved.

We admit that all such transactions should be regarded with suspicion; but where full knowledge and consent of all parties interested are clearly shown we know of no public policy, or principle of sound morality which can be said to be violated. It seems to us rather that public policy requires that contracts fairly entered into by parties competent to contract should be enforced where no public law has been violated and no corrupt purpose or end is sought to be accomplished. True, such agent may not be able to serve each of his principals with all his skill and energy. He may not be able to obtain for his vendor principal the highest price which could be obtained, or for the purchaser the lowest price for which it could be purchased. But he can render to each a service entirely free from falsehood and fraud; a fair and valuable service in which his best judgment and his soundest discretion are fully and freely exercised. And in such case, such service is all that either of his principals contracted for. Undoubtedly if two persons desire to negotiate an exchange or a bargain and sale of property, they may agree to delegate to a third person the power to fix the terms, and no suspicion of a violated public policy would arise. It may be said that such third person is an arbitrator chosen to settle differences between his employers, an agency or office greatly favored in the law. And so it is. But what is the distinction between that employment, and the one in the present case, which should cause the law to favor the former and abhor the latter? I can see none.

True, in the case put, the contracting parties deal directly with each other, and in the case at bar their minds meet through the medium of a third person in whose judgment and discretion they mutually repose confidence. His judgment and discretion are invoked by each to aid in fixing the terms of a contract between

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them. And after the terms are thus adjusted through the aid of their mutual agent and ratified by the parties, in the free exercise of their own volitions, to hold that the relation between such agent and either of his principals is in violation of a sound public policy supposed to rest on some moral abstraction would be a refinement in legal ethics too subtle for my comprehension.

Of course to relieve such double agent from suspicion that inconsistent duties have been assumed, which *prima facie* will be presumed, it is necessary that it should appear that knowledge of every circumstance connected with his employment by either should be communicated to the other in so far as the same would naturally affect this action; but when that is done and free assent is given by each principal to the double relation of the agent, the right of such agent to compensation cannot be denied on any just principle of morals or of law.

The refusal of the Court of Common Pleas to charge as requested and the second proposition given, if not plainly in conflict with the views above expressed, were at least so susceptible of such construction, that the jury may have been misled. Hence we think the District Court did not err in reversing the judgment.

Judgment of District Court affirmed.

LONGWORTH, J., dissented.

DARLING V. YOUNKER.

(87 Ohio St. 487.)

Agency — liability of agent for lost money.

In an action against an agent for loss of money intrusted to him for his principal, the burden is on the agent to show that there was no breach of duty on his part, and this ordinarily is a question of mixed law and fact.

THE opinion states the facts. The defendant had judgment below.

Spangler & Pomerene, for plaintiff in error.

Nicholas & James, for defendant in error.

Darling v. Younker.

Oakey, C. J. The plaintiff (Darling) and the defendant (Younker) were neighbors living in Coshocton county, about fourteen miles from the town of Coshocton. They had known each other from boyhood, and both were dealers in live stock. The plaintiff had in the hands of a firm engaged in selling live stock at Pittsburgh, the proceeds of the sale of a lot of hogs which he had shipped to that city for sale: and he also had a lot of hogs at Warsaw, in Coshocton county, which he wanted to send to Pittsburgh for sale by the same firm. Being unable to leave home by reason of sickness in his family, he employed the defendant to drive the hogs from Warsaw to Coshocton, take them from Coshocton to Pittsburgh by car, deliver them to the firm referred to for sale, receive from the firm the proceeds of the sale of both lots, bring such proceeds to Coshocton, there pay Stewart \$1,200, and then carry and deliver to him, the plaintiff, the balance.

The hogs were shipped in a car at Coshocton, on December 23, 1874, the defendant taking passage in the caboose. Finkbone, of Fairfield county, also a dealer in live stock, had a lot of hogs in cars of the same train, which he was taking to Pittsburgh for sale, and he and the defendant became acquainted in the caboose and stopped at the same hotel in Pittsburgh. The hogs taken by Finkbone as well as those taken by the defendant were sold the next day (December 24). In the afternoon of the same day a member of the firm which sold the stock went with the defendant to one of the Pittsburgh banks, where the sum of \$3,100.54, being the whole amount due to the plaintiff, was paid to the defendant. The money consisted of four bank bills, each for \$500, and other bills of smaller denomination, and fifty-four cents in change. The defendant folded the bills in a piece of newspaper, and placed the roll in a pocket in the inside of his vest, and left the bank. Soon afterward, the amount due to Finkbone, for his hogs, being about \$3,000 was paid to him at the same bank, but he was unable to obtain at the bank any bill of a larger denomination than \$50.

The defendant and Finkbone took passage on that evening at Pittsburgh in the same passenger car, and came together as far as Coshocton, arriving there about ten o'clock at night. The defendant stopped at Coshocton, and Finkbone remained in the car until he reached Kirkersville, which is near his residence. On the way from Pittsburgh to Coshocton the defendant and Finkbone sat together conversing about the live stock business. Finkbone in-

formed the defendant that he had tried to get larger bills but failed. The defendant asked him if it would be an accommodation if he would let him have one \$500 bill and Finkbone said it would. About half the seats in the car were occupied, chiefly the middle seats. Finkbone took out his money, but at the suggestion of the defendant, they went to the front part of the car, to get as far as possible from the other passengers and have the benefit of the light, and sat down together in one of the front seats. Finkbone then took from his package ten \$50 notes, handed them to the defendant who took from the package in his possession one of the \$500 notes, handed it to Finkbone, put the ten bills in the place of the bill he had given to Finkbone and restored the package to his inside vest pocket, taking care that there should be no mistake in making the exchange and that none of the bills should be lost. This was about an hour before the train arrived at Coshocton.

The defendant arriving at Coshocton, as already stated in the night, it became necessary for him to remain at a hotel till morning. The banks were closed of course, and it does not appear whether there was or was not a safe in the hotel where he stopped. There was however a hardware store in Coshocton owned by a firm in which a brother of the plaintiff was a partner, and the defendant was then aware of the fact that the plaintiff was in the habit of depositing considerable sums of money in the safe of that firm which they kept in the store. The defendant went directly from the depot to the store which he found still open, Bonnett, a nephew of the plaintiff and employee of the firm being there alone. The defendant turned and was about to leave the store when Bonnett inquired what was wanted, and the defendant informed him that he had a package of money belonging to the plaintiff, stating the amount, which he desired to have placed in the safe. Bonnett said he could attend to it and took the package and locked it in the safe, and the defendant then went to his hotel leaving Bonnett in the store. From the time the defendant received the money at the bank until he handed it to Bonnett in the store it had not been out of his pocket except when he exchanged the bills, as already explained, on the train.

The next morning (December 25) the defendant went to the hardware store, and Bonnett at his request opened the safe and took therefrom the package of money and handed it to him. On counting the money in the presence of Bonnett and plaintiff's

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brother, it was ascertained that one of the \$500 bills was missing, the balance of the money including two \$500 bills being there. The defendant paid to Stewart \$1,200 in accordance with the instruction already mentioned, and on the same day (December 25) delivered to the plaintiff Stewart's receipt and \$1,400.54 in money and informed the plaintiff of all the facts here stated, including the exchange of bills, the deposit in the safe and the loss of the \$500 note.

Such in substance is the testimony of Younker, as delivered in the Court of Common Pleas of Coshocton county, on the trial of an action brought by Darling against him to recover the sum of \$500. His evidence was corroborated by the testimony of Finkbone, and the jury believing the defendant's story found a verdict in his favor; the court after overruling a motion for a new trial, rendered a judgment on the verdict; the District Court affirmed the judgment, and this petition in error was filed to reverse both judgments.

During the trial evidence was also offered to show that the defendant was confused at the time the money was counted in the store; that he then stated that in the money paid to him at the bank there were \$500 bills; and that he also stated that he did not have the money out of his pocket from the time he placed it there in the bank until he took it out in the hardware store. But an explanation as to these statements was furnished, showing that they as well as the confusion were caused by the defendant's excitement on discovering the loss, and the statements were corrected by him on the same day. Furthermore, it was shown that he had said that he would pay the amount so lost to the plaintiff but that he must have the matter investigated; and when the plaintiff brought suit, the defendant withdrew all proposals looking to a settlement. There was also evidence tending to show that the exchange of money on the cars was not an unusual occurrence.

The foregoing embraces all the evidence, except with respect to two or three matters which seem to be wholly unimportant. What the facts in relation to the missing bill really are may never be known. Whether the note was dropped in the cars, or whether somebody was dishonest is matter of conjecture. The defendant is quite certain no mistake was made at the bank. In giving to the testimony a construction consistent with that honesty of the defendant which the plaintiff with an acquaintance of forty years

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believed he really possessed when he employed him to perform the service, we are not prepared to say the jury erred.

If on learning that the defendant had taken one of the notes from the package, the plaintiff had treated the act as a conversion and brought suit to recover the whole amount so received by the defendant at the bank, a different question might have been presented. It was the duty of the defendant to receive the money from the commission merchants at Pittsburgh, carry it to Coshoc-ton, there pay to Stewart \$1,200 and take the balance of the money to the plaintiff and deliver it to him. As BIGELOW, C. J., says in *Kent v. Bornstein*, 12 Allen, 342, "any act or dealing with the money beyond this was outside of the scope of his employment. He had no authority to enter into any contract concerning the money in his hands or to exchange it for other money with third persons." And see *Phillpott v. Kelley*, 3 Ad. & El. 106; *Clendon v. Dinneford*, 5 C. & P. 13; *Greenwald v. Metcalf*, 28 Iowa, 363; Edw. on Bailm., §§ 67, 97. But we do not find it necessary to decide as to the law that would have been applicable if the plaintiff had taken the course indicated. On being informed of the loss, the plaintiff accepted as cash, the receipt of Stewart and the balance of the money in the defendant's hands, making \$2,600.54, which he knew included the bills given by Finkbone in exchange for one of the \$500 bills, and the plaintiff brought suit against the defendant for the missing \$500 bill. This therefore was a complete ratification by the plaintiff of the act of the defendant to that extent. Ewell's Evans on Agency, 94.

No action could be maintained for the conversion of the missing bill nor as for money had and received, the jury having found that there was no misappropriation of the bill by the defendant and the verdict in that respect not appearing to be wrong. *Sturgis v. Keith*, 57 Ill. 451; 11 Am. Rep. 28; *Perry v. Roberts*, 3 Ad. & El. 113. But where an agent is guilty of negligence whereby the money of his principal is lost, an action may be maintained on that ground. And here the question is whether we can say as matter of law, that the acts of the defendant in making the exchange in the car and the deposit in the safe, afford a ground of recovery as to the missing \$500 bill because of the defendant's negligence, and without regard to the question of actual good or bad faith. But as to the deposit in the safe, we can see in it nothing objectionable under the circumstances. It was the safe in which the plaintiff made his own deposits

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of money, and the safe was in charge of the brother and nephew of the plaintiff. Indeed the plaintiff made no complaint that such deposit had been made. The real question therefore is as to the alleged negligence in making such unauthorized exchange of money in the cars.

An agent is not an insurer for the safe delivery of money placed in his care to carry to his principal. No doubt however where he claims that money so intrusted to him is lost, the burden is upon him, whether the service be for or without reward (*Anderson v. Foresman*, Wright, 598; Ewell's *Evans on Agency*, 327), to show that the loss was not occasioned by a want of that care on his part which men of ordinary prudence observe when clothed with such a trust. The real question in every case where negligence is alleged is whether there has been a breach of duty, and that is to be determined from a consideration of all the facts. But here the question whether the acts of the defendant amounted to such negligence as would afford ground of recovery, was a question of fact and not merely one of law. Cases can be found in which the question of negligence has been determined as one of law. See 28 Ohio St. 340; 35 id. 627; see however, 12 id. 71, 72; 35 id. 57; *Pierce on Railroads* (ed. of 1881), 312, 314, *et seq.* But where the facts are in dispute or the question is to be determined by inference from facts proved, the question is necessarily one of fact; nor can it be a question of law in any case, if reasonable men, unaffected by bias or prejudice, might disagree concerning the presence or absence of due care.

Judgment affirmed.

GIFFORD V. MORRISON.

(37 Ohio St. 502.)

Judgment — impeachment of, in equity.

A court of equity will not decree a judgment lien to be invalid for want of legal notice to the defendant, where the plaintiff was not guilty of misconduct and the defendant had actual knowledge of the pendency of the action, unless a meritorious defense is shown.

ACTION to quiet title. The real estate in question was purchased by the plaintiff from Allaire, on February 14, 1876. On December 28, 1875, the defendant obtained from a justice of the peace

a summons against Allaire to recover \$129.56, returnable December 31, at 9 o'clock A. M., and delivered it to a constable for service on the day it was issued. A copy was delivered by the constable to Allaire on the afternoon of the return day. Before the service, the return day, without the knowledge of the justice, or of the plaintiff Morrison, was changed to January 3, 1876. The summons so altered was returned indorsed, "Served on the defendant Allaire, December 31, 1875." On January 3, judgment was rendered by the justice in favor of Morrison against Allaire by default, for the amount claimed, and a transcript was filed in the clerk's office, which constitutes the lien complained of here. The defendant had judgment below.

E. Sowers, for plaintiff in error.

Birney & Hobart, for defendant in error.

MCLLVANE, J. For aught that appears on the record before us, the plaintiff had actual knowledge of all the facts stated in her original petition, at the time she purchased the property, as well as constructive notice of the existence of the judgment and lien of the defendant. It is not pretended that any ground for equitable relief exists in her favor, which would not, with equal right, be asserted by Allaire, her grantor; and we think it is quite clear, that upon the facts stated, equity would not afford relief to Allaire, the judgment debtor.

That errors and irregularities intervened in the action and proceedings before the justice must be conceded, but whether they appeared on his record is not shown. If they do appear on his record, the judgment, no doubt, might have been reversed on proceedings in error. And the rule is, that equity will not afford relief, where there is a plain and adequate remedy at law. Allaire had knowledge of the pendency of the action before the justice. True, the notice by summons was not regular, but it informed him that the action had been commenced, and he was thus afforded an opportunity to correct the irregularity on motion, to the justice, or by petition in error if the irregularity appeared on the face of the record. But whether the irregularity appeared of record or not, he could have no standing in a court of equity without an allegation of meritorious defense. Having failed to exercise diligence in seek-

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ing redress at law, equity would not set aside the judgment until it was made to appear that the result should be other or different from that already reached. No such showing is made in the case before us.

We do not deny that equity, under some circumstances, will restrain the execution of a void judgment, without an allegation of defense, as for instance, when the fraud or misconduct of the plaintiff in obtaining the judgment is shown; but such jurisdiction is never exercised without such showing where the judgment is voidable merely, or where, though absolutely void, it appears to be regular on the face of the record.

No misconduct is alleged against the judgment creditor, Morrison, and for aught that is alleged, the record of the justice may be entirely regular upon its face. If the justice adopted the change made as to the return day of the summons (as would seem to be the case), the docket would be unobjectionable in form. True, the return of the constable that the defendant was summoned to appear on January 3, 1886, was false; but the falsity of that return would not relieve either the judgment debtor or the plaintiff from the necessity of showing, in the petition for equitable relief, a meritorious defense to the action.

The contention of the plaintiff in error is that the justice's judgment is absolutely void for want of jurisdiction over the person of Allaire. But in disposing of the case, I have not deemed it profitable to trace the many nice distinctions which have been drawn between judgments void at law and those voidable merely, and have confined myself to the consideration of those principles upon which courts of equity will or will not interfere and set aside judgments for want of proper notice, whether they be such as are commonly denominated void or only voidable.

The practice upon this subject is fairly stated by Mr. Freeman in his work on "Judgments," as follows: "Section 498. It has been held that a judgment, rendered without process and without the knowledge of the defendant, may be relieved against without any showing on the question of merits, for the reason that 'in such case the injury consists in the rendition of the judgment against a party without notice and opportunity of defense; and that it is unjust and unconscientious to attempt to enforce a judgment so obtained.' But the better established rule undoubtedly is, that notwithstanding an alleged want of service of process, a court of equity will not

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interfere to set aside a judgment until it appears that the result will be other or different from that already reached." See also *Taggart v. Wood*, 20 Iowa, 236; *Gregory v. Ford*, 14 Cal. 138; *Fowler v. Lee*, 10 G. & J. (Md.) 363 (32 Am. Dec. 172); *Piggot v. Addicks*, 3 G. Greene, 427; *Crawford v. White*, 17 Iowa, 560; *Stokes v. Knarr*, 11 Wis. 389.

Equity is not concerned about a judgment, which though irregular is in fact equitable and just.

Judgment affirmed.

WHITE, J., concurred in the affirmance of the judgment, without approving of the syllabus as applied to the case. He was of opinion that the judgment of the justice of the peace in question was not void, but voidable only. Hence the question as to what are the rights of a purchaser from the judgment debtor, where the land purchased is sought to be charged in execution under a void judgment, does not arise in this case.

PITTS V. FOGLESONG.

(37 Ohio St. 676.)

Negotiable instrument — transfer as collateral — accommodation indorser.

An accommodation indorser of a negotiable note without restriction is liable to one receiving it in good faith from the owner, before maturity, solely as collateral security for an antecedent debt.

ACTION on a promissory note. The opinion shows the facts. The plaintiff had judgment at trial, which was reversed in the District Court.

John S. Brases, for plaintiffs in error.

K. Fritter, for defendant in error.

OKEY, C. J. Where one not induced by fraud indorses a negotiable promissory note for the accommodation of another, without restriction as to the use which may be made of the note, a third person who receives it before due as collateral security for a debt to become due from the person for whom the indorsement was made,

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and subsequently prosecutes an action against such indorser, will not be affected, with respect to his right to recover, by the fact that such defendant is an accommodation indorser. The obligation of the indorser in such case is the same, whether the indorsement was for value received or for accommodation. *Stone v. Vance*, 6 Ohio, 246; *Riley v. Johnson*, 8 id. 526; *Williams v. Bosson*, 11 id. 62; *Clinton Bank v. Ayres*, 16 id. 282; *Portage Co. Bank v. Lane*, 8 Ohio St. 405; *Erwin v. Shaffer*, 9 id. 43; *Knox Co. Bank v. Lloyd*, 18 id. 353; *Kingland v. Pryor*, 33 id. 19; *First National Bank v. Fowler*, 36 id. 524; s. c., 38 Am. Rep. 610. And see *Jackson v. Bank*, 42 N. J. 177.

The question in this case is therefore as to the liability of Foglesong upon his indorsement, in view of the fact that the note so indorsed was transferred by Creed Bros. as collateral security for the payment of notes to become due from them to Pitts, Graham & Co., no express agreement having been made by the latter for an extension of time or other favor with respect to the notes made by Creed Bros.

In *Roxborough v. Messick*, 6 Ohio St. 448, it was held: "Where the note of a third person is transferred bona fide before due, as collateral security, and for value, such as in consideration of a loan or advancement, or a stipulation, express or implied, of further time to pay a pre-existing debt, or in consideration of a change of securities of a pre-existing debt, or the like, the holder of such collateral will be protected from infirmities affecting the instrument before it was thus transferred." And see 1 Dan. Neg. Inst., § 830.

Here there was no consent on the part of Pitts, Graham & Co. to the extension of time as to any part of the debt, until their debtors proposed to place in their hands the Becker note, and it is a presumption which is by no means unreasonable that obtaining possession of that note was with them an essential part of the arrangement by which the time was extended. True, they had been unable to dispose of the note in the manner intended, though it does not appear that they had abandoned hope of disposing of it substantially in the same way. It is certain that they did not return it to Creed Bros., but retained possession, and it is not probable they would have consented to part with possession before they were paid. That they only agreed not to dispose of the note in view of the agreement that they should hold it as collateral security, and that this is in harmony with the original purpose of the parties,

is by no means improbable. Moreover they did in fact wait until the Becker note became due, retaining it in the meantime ; and they demanded payment of the maker, at the maturity of the note and gave notice of non-payment to Foglesong, the indorser, and then brought suit, the debt from Creed Bros. remaining unpaid. But whether or not it is to be fairly inferred from these facts that time was given to Creed Bros. in consideration of the security afforded by the Becker note, within the rule so stated in *Roxborough v. Messick*, is a question not entirely free from difficulty, and it is unnecessary to express any definite opinion upon it.

The defendant's counsel insists that the case falls within the second proposition decided in *Roxborough v. Messick*, and hence that Pitts, Graham & Co. were not entitled to recover. That proposition is as follows : " When a debt is created without any stipulation for further security, and the debtor afterward, without any obligation to do so, voluntarily transfers a negotiable instrument, to secure the pre-existing debt, and both parties are left in respect to the pre-existing debt, in *statu quo*, no new consideration, stipulation for delay, or credit being given, or right parted with, by the creditor, he is not a holder of the collateral for value, in the usual course of trade, and receives it subject to all the equities existing against it at the time of the transfer." ♦

We are by no means disposed to question the proposition so decided. While it is not concurred in by some judges for whose opinions we have great respect (*Railroad Company v. National Bank*, 102 U. S. 14 ; *Poirier v. Morris*, 2 E. & B. 89 ; *Currie v. Misa*, L. R., 10 Ex. 153 ; 1 App. Cas. 554 ; 14 Am. L. Rev. 481), its correctness has been repeatedly recognized in this court and elsewhere. *Reznor v. Hatch*, 7 Ohio St. 248, 255 ; *Gebhart v. Sorrels*, 9 id. 461, 466 ; *Cleveland v. State Bank*, 16 id. 236 ; *Copeland v. Manton*, 22 id. 398, 402 ; 14 Am. L. Rev. 485.

But the principle so stated in *Roxborough v. Messick* is not applicable to this case, and hence cannot control it. The same rule prevails in Pennsylvania (*Petrie v. Clark*, 11 S. & R. 377 ; *Royer v. Keystone Bank*, *Cummings v. Boyd*, 83 Penn. St. 248, 372) ; and yet in *Lord v. Ocean Bank*, 20 Penn. St. 384, it was held that " the maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there merely as a collateral security for a debt of the payee." BLACK, C. J., who delivered the opinion, fully recognized

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the rule applied in *Roxborough v. Messick*, and added : “ But the maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there as collateral security merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence (12 S. & R. 382), and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way.” And the same thing had been asserted before, and was asserted afterward, in the same court. *Appleton v. Donaldson*, 3 Barr. 381 ; *Work v. Kase*, 34 Penn. St. 138.

So in New York the rule is as stated in the second proposition in *Roxborough v. Messick*, 14 Am. L. Rev. 485; *Duncomb v. N. Y. etc., R. Co.*, 84 N. Y. 190, 204; and yet in *Grocers' Bank v. Penfield*, 69 id. 502; s. c., 25 Am. Rep. 231, the court fully recognizing that fact hold: “ Where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorsee taking it in good faith as collateral security for an antecedent debt of the payee and indorser without other consideration, occupies the position of a holder for value and can recover thereon against the maker. The precedent debt is a sufficient consideration for the transfer and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was intended, by the payee or where some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note in order to enforce the same.” And the same distinction had been asserted in that State previously and has been re-asserted subsequently. *Schepp v. Carpenter*, 51 N. Y. 602; *Freund v. Bank*, 76 id. 352.

Cases in support of the distinction here made are quite numerous. Many of them are collected in 14 Am. L. Rev. 486, 488; Story on Prom. Notes (7th ed.), 265, 266, note; *Maitland v. Citizens Bank*, 40 Md. 540, 567; c. c., 17 Am. Rep. 620; 9 Ohio St. 51. Indeed the only case I have found which can be regarded as supporting a different view of the law upon this subject, is *Bramhall v. Beckett*, 31 Me. 205 (cited in *Nutler v. Storer*, 48 id. 163); but in that case the distinction, so well made in *Lord v. Ocean Bank*, *Grocers' Bank v. Penfield*, and other cases cited, is not alluded to by court or counsel.

A claim has been made that the language of the court in *Roxbor-*

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ough v. Messick is broad enough to warrant the conclusion that Foglesong is exonerated from liability upon the mere ground that he was an accommodation indorser. But in that case it appeared that Roxborough, the maker of the notes, had a defense to them, and their transfer by Wilcox, the payee and indorser, as collateral security, was a fraud upon him. Of course the learned judge who delivered the opinion in that case never intended it to extend to a case arising on an accommodation indorsement of this character, and any general language he may have employed must be limited to cases like that which was then before the court.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

GRAY V. STATE EX REL. MILLS

(78 Ind. 68.)

Estoppel — surety on guardian's bond.

The surety on a guardian's bond, executed to enable him to sell his ward's real estate, is estopped, after the sale and receipt of the money, to deny his appointment as guardian.

ACTION on a guardian's bond. The opinion states the case. The plaintiff had judgment below.

T. J. Kane, T. P. Davis, W. Garver, R. Graham, A. F. Shirts, G. Shirts and W. R. Fertig, for appellants.

R. R. Stephenson, for appellee.

BEST, C. The facts out of which this controversy arises are briefly these: At the January term 1860, of the Common Pleas Court of Hamilton county, Indiana, the appellant Elisha Mills, as guardian of Frank A. Mills, the relator, and Clara M. Mills, his sister, filed his application to sell their real estate, caused it to be

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appraised, and upon the order of the court executed his bond, with his co-appellants as his sureties, and upon his approval obtained an order to sell such real estate, which he subsequently did for the sum of \$2,340. After the relator attained full age, he brought this suit upon the bond to recover such portion of one-half of such sum as remained unexpended. Issues were formed, and upon the trial the appellants Gray and Baker offered to prove that Elisha Mills, the principal in said bond, was not in fact the guardian of Frank A. and Clara M. Mills, when the bond was executed. This the court excluded, on the ground that they were estopped by the execution of the bond to prove such fact. This question was properly saved, and is the only one discussed by appellants in their brief.

The bond is as follows: “ Know all men by these presents, that we, Elisha Mills, Joseph R. Gray and Nehemiah H. Baker, are bound unto the State of Indiana, in the penal sum of four thousand dollars (\$4,000), to pay which we jointly and severally bind ourselves, our heirs, executors and administrators. Sealed and dated this 28th day of January, 1870.

“ The condition of the above obligation is, that as the above bound Elisha Mills, guardian of Frank A. Mills and Clara M. Mills, minor heirs of Martha A. Wren, deceased, has been ordered by the Court of Common Pleas of Hamilton county to sell certain real estate of the said wards, now if the said Elisha Mills will faithfully discharge the duties of his trust according to law, then the above obligation is to be void, else to remain in full force in law.

“ ELISHA MILLS. [SEAL.]

“ J. R. GRAY. [SEAL.]

“ N. H. BAKER. [SEAL.]”

This bond was executed in conformity with the provisions of our statutes, was authorized by them, and is conceded to be a valid and binding obligation unless the appellants can show that Elisha Mills was not in fact the guardian of the relator. Can they do this? We think not. After having joined him in the bond, recited the relation he sustained to the relator, enabled him to procure the order, sell the land and obtain the money, nothing but a meritorious defense should exonerate them from the obligations of their bond. All the facts necessary to create an estoppel are present.

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The bond was executed, the recital made, the order procured and the money of the relator obtained, and to allow the appellants to avoid its payment by a denial of their own recital would result in such manifest injustice that no court, it seems to us, ought to hesitate in applying the doctrine of estoppel in exclusion of such defense. The appellants however say that the entire proceeding was a nullity ; that the relator's title to the land was not divested by such pretended sale, and that the money realized therefrom was not the money of the relator, but of the "would-be purchaser."

In support of this position, the case of *Coon v. Cook*, 6 Ind. 268, is cited. The case does not support them. In that case a pretended guardian obtained an order to sell the real estate of a person of unsound mind, made the sale, obtained the money, and afterward the assignee of the purchaser brought an action against the guardian of such person subsequently appointed to enforce the specific performance of such contract, obtained a decree, and on appeal this court held such contract a nullity. Upon the facts stated, as between the parties to that suit, the decision was unquestionably right ; and if this was an action by the purchaser to obtain a conveyance, or by the relator to recover or quiet his title to the land, the case cited would be decisive of the rights of the parties. This is not however such a case. The relator, by the institution of this suit, does not question either the regularity or the legality of such sale, but on the contrary if such objections exist, waives them all and affirms the sale. This may do, and although he cannot convey the title by election or estoppel, yet he can affirm the sale, take the purchase-money, and thus preclude himself from claiming the land. The acceptance of the purchase-money, arising from an invalid sale, affirms the sale and estops the party from questioning its validity. This rule applies as well to void sales made by guardians as by others. *Deford v. Mercer*, 24 Iowa, 118.

If then the principal on the bond was not in fact the guardian of the relator, and this fact renders the sale void as between the relator and the purchaser, the acceptance of the purchase-money will estop the relator from questioning the sale, and as to him it will be treated as valid. The relator having the right to affirm the sale, and having brought this suit in affirmance of it, we think as between the parties to this record on the question of estoppel, the sale must be treated as valid, and the money arising therefrom as belonging to him.

Again to assume that the relator's title to the land was not divested by such sale, and the money arising therefrom did not belong to him, in order to avoid the estoppel, is assuming the truth of just such facts as the estoppel precludes the appellants from proving. The estoppel can not be avoided in this way. If it could it would follow that a party could thus reap the benefit of such facts as the estoppel is invoked to exclude.

Nor can it be avoided by the fact that the relator may reclaim his land. If so it only proves that he has another remedy. This however may not be so adequate, and to compel him to resort to it not only deprives him of an election between inconsistent remedies, but may result in actual loss to him. In this case the land may have been sold for its full value ; the interest may largely exceed the rents and profits ; the land may have depreciated in value ; the rents and profits may be beyond recovery, and the land itself may be in the possession of those who will not surrender it without a contest. These considerations, and others that will readily suggest themselves, show that a denial of the facts recited in the bond will deprive the relator of substantial rights under it, which he can not otherwise assert or enforce, and to deprive him of them is a sufficient reason for excluding the defense.

The appellants also insist that the bond is invalid, and for that reason they are not estopped.

If so we agree with them, as an invalid instrument does not work an estoppel. Such as have been taken in violation of law, or have been procured by fraud or duress, for instance. This bond was not so procured, nor was it taken in violation of law. The law authorized its execution, and as there is nothing about the bond indicating its invalidity, we know of no reason why it should not be treated as valid in determining whether or not its makers should be estopped to dispute its recitals. If the recitals are true, the bond is valid, and we think that for the purpose of determining whether its recitals can be disputed, it must be regarded as valid. To regard it otherwise, is to successfully contradict its recitals before it has been decided that it can be done. This is not the law ; otherwise every recital in every instrument could be disputed with impunity.

Indeed the very reasons urged against its validity furnish the strongest argument in favor of the estoppel. If the appellants are allowed to dispute their recital, the relator will lose his money and the purchaser his land. On the other hand, if the proof is excluded

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justice will be done to all and injury to none. The relator will be secured, the purchaser protected, and the bond enforced, precisely as it would be were the facts as recited. To avoid similar results, the doctrine of estoppel was adopted, and to avoid these, we think, it should be applied. Upon principle it seems to us, the appellants ought to be estopped, but they insist it has been held otherwise in the case of *Thomas v. Burrus*, 23 Miss. 550.

In this case a guardian had been appointed, and while such appointment remained unrevoked, the court appointed another, and in a suit upon the bond of the latter it was held that the appointment of the first exhausted the power of the court, and for that reason the appointment of the latter was void. In support of this conclusion the cases of *Griffith v. Frazier*, 8 Cranch, 9 ; *Bledsoe v. Britt*, 6 Yerg. 458, and *Lewis' Ex'rs v. Brooks*, id. 167, were cited. They fully support the conclusion, in which we concur, but an examination of them shows that no question of estoppel arose in either of them. In each a right was asserted through such appointment.

In *Griffith v. Frazier*, an administrator was appointed while another who had been formerly appointed was administering, and in a suit for the recovery of land the defendant claimed title through such appointment, and it was held that such appointment was void.

The case of *Bledsoe v. Britt* was an action of assumpsit by the latter as guardian, and it was held, as the wards had a guardian when the plaintiff was appointed, her appointment was void.

In *Lewis' Ex'rs v. Brooks*, John, Robert and Arthur Brooks had been appointed administrators, and as such had recovered a judgment against the executors of Lewis for \$3,000. Arthur Brooks died, and John F. Stump was appointed administrator *de bonis non*. Afterward Stump compromised with the executors of Lewis, and John and Robert Brooks disregarding such compromise, the question arose as to its validity. This depends upon the legality of his appointment, and it was held, that as an administration is an entire thing, and as John and Robert Brooks were the administrators of such estate when Stump was appointed, his appointment was void.

The question of the legality of these several appointments was involved in these cases, and was correctly decided, but it does not therefore follow that if these suits had been upon the bonds of the several persons whose appointments were held void, the same thing would have been decided, or that the question would have arisen.

The case of *Thomas v. Burrus*, *supra*, not only decided that such appointment was void, but held that the surety was not estopped from showing it. The court said the doctrine of estoppel "presupposes a valid or legal obligation, and we do not know any authority, and reason certainly is against the position, that a party is estopped by any recital contained in an instrument from showing that the instrument containing it is absolutely null and void," and concluded by saying, that if the court had no power to accept the bond its acceptance fixed no liability upon the surety. It is clear that the cases cited do not support the court's conclusion, and so far as we knew, no case does. If the instrument is invalid, of course it can not work an estoppel, but its invalidity can not be shown by disputing its recitals. It must otherwise appear. It did not otherwise appear in such case, and therefore we do not feel like following it.

On the other hand, several authorities support the conclusion we have reached.

In *Cutler v. Dickinson*, 8 Pick. 386, where there was no evidence of the administrator's appointment except such as appeared from the bond, it was held that the obligors were estopped to deny his appointment.

The case of *Shroyer v. Richmond*, 16 Ohio St. 455, was a suit upon a guardian's bond. The sureties insisted that the guardian's appointment was illegal. The court held that they were estopped, and said : "By executing this bond, they obtained for their principal the possession and control of his ward's property, and can not now be permitted to escape liability to account therefor, by denying the recitals of their own bond. They are estopped to do so."

The case of *Fridge v. The State*, 3 G. & J. 103 (20 Am. Dec. 463), was a suit upon a guardian's bond, in which the surety urged the invalidity of the principal's appointment as a defense, and it was held that he was estopped. The court say : "Owen Dorsey having given his bond, in which he is stated to be the guardian of E. A. K., and having obtained possession of her property, it would not, in a suit against him, have lain in his mouth to deny that he was guardian, in the very face of the recital in his bond, or to set up any supposed irregularity in obtaining the appointment; the recital in the bond being evidence as against him, that he was guardian. Nor does it lie in the mouth of his surety, against whom the recital is equally evidence."

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Norton v. Miller, 25 Ark. 108, was a suit upon a guardian's bond, and the invalidity of the appointment was urged as a defense. The court held that although the appointment was irregular, it having been made in the wrong county, the principal and his sureties were estopped by the recitals in the bond to raise the objection.

The case of *Iredell v. Barbee*, 9 Ired. 250, was a suit upon the bond of the guardian of an insane person. The law did not authorize the appointment unless it had been found by a jury that such person was a lunatic or an idiot, and as it was not so found, it was insisted that the bond was void. The court said: "It is true, the court had not power to appoint King the guardian of Mrs. Fann, and authorize him to take her estate into his possession, but the defendant will not be heard to make this objection; he concurred in the act; his bond solemnly asserts that. * * * And after King has taken the estate into possession and wasted it, it is not for him to say, that it was unlawful, and therefore that he is not bound by his undertaking deliberately entered into."

These cases we think decisive of the question under discussion. It is true that in some of them appointments had been irregularly made, but this fact does not impair the force of such cases as authority upon the question. The obligors in such cases were estopped, not because of an irregular appointment, but because the bond recited the fact that an appointment had been made. In the case first above cited there was no proof of an appointment, and in the case last above cited the court was not authorized to appoint, yet it was held that the makers of such bonds were estopped to deny the fact of appointment. These cases are very analogous.

Again, in *Collins v. Mitchell*, 5 Fla. 364, it was held that the sureties upon a sheriff's bond were estopped to deny that their principal was sheriff when the bond was made, though he was dead, the principal's name having been signed by another. If dead, of course he was not sheriff; still the sureties were bound. And we think the appellants are bound, through their principal had not in fact been appointed the guardian of the relator.

The appellants also refer us to the following cases in support of their position, viz.: *Pryor v. Downey*, 50 Cal. 388; *Perry v. Brainard*, 11 Ohio, 442; *Higginbotham v. Thomas*, 9 Kans. 328.

We have examined them and find that no question of estoppel was involved in either of them. Each was an action of ejectment. In the first, title was claimed through an administrator's sale; in

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the others, through guardian sales. In the first, it was held that the sale was void because the pretended administrator had not been appointed; in the last, because such guardian had not been appointed; and in the other, because the sale was made after the ward arrived at full age. In none of them did the persons making the sales have any authority to make them, and therefore no title could be derived through them. This is in accordance with what was decided in *Coon v. Cook, supra*, and is in entire harmony with the conclusion we have reached.

Upon principle and upon authority, the ruling of the court below was right, and the judgment should therefore be affirmed.

Per Curiam.—It is therefore ordered that upon the foregoing opinion the judgment be, and it is hereby in all things affirmed.

Judgment affirmed.

Petition for rehearing overruled.

ROBERTSON V. TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

(78 Ind. 77.)

Master and servant — negligence — fellow-servant.

A railway brakeman was injured by collision with another train, moving in the opposite direction, and which had been negligently sent out by the train dispatcher. *Held*, that he had no cause of action against the railway company.*

ACTION of damages for personal injury by negligence. The opinion states the case. The defendant had judgment below.

S. B. Gookins, G. C. Duy and W. H. H. Russell, for appellant.

J. G. Williams, for appellee.

MORRIS, C. The appellant brought this suit to recover damages for an injury alleged to have been received by him while in the service of the appellee as a brakeman on one of its trains. To the appellant's complaint the appellee filed a general denial. The cause

* To same effect, *Slater v. Jewett* (85 N. Y. 61), 89 Am. Rep. 627.

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was submitted to a jury for trial. The appellant having introduced his evidence in support of his complaint, the appellee demurred to it. The appellant joined in demurrer. The court sustained the demurrer and judgment was rendered for the appellee. The appellant assigns as error the sustaining of the demurrer.

The testimony shows that on the morning of the 28th of March, 1876, the appellant was in the employ of the appellee as head brakeman on its train No. 14, and that said train left Indianapolis for Terre Haute on that morning at one o'clock and forty minutes. That the regular time of said train for leaving Indianapolis was one o'clock and ten minutes A. M., but that in accordance with the rules and regulations of the appellee, it waited at Indianapolis a half hour for train No. 19, which was due from Terre Haute. That at or near Bridgeport, some nine miles west of Indianapolis, No. 14 collided with No. 19. That without fault on his part, and in consequence of such collision, the appellant's leg was caught between the coal car and tender, and crushed and broken so that it had to be amputated. The testimony also shows that there was a side-track on the appellee's road at Bridgeport that would hold sixty cars; that there was a switch at the west end of said side-track and that the collision took place a short distance east of the side-track. Train No. 19, running eastward from Terre Haute to Indianapolis, passed the side-track at Bridgeport intending to run upon the side-track through the switch at its east end. That it could have run upon the side-track through the switch at the west end, and that had it done so, the injury might not have happened to the appellant.

The testimony further showed that the appellee's train dispatcher lived at Terre Haute; that no notice was given to train No. 19 of the time at which train No. 14 left Indianapolis, that train No. 19 was not running on time, being about one hour behind time at Bridgeport; and that it was running in violation of the rules of the appellee. That No. 14, on which the appellant was brakeman, was running on time and in accordance with the rules and regulations of the appellee, and that the collision occurred without fault on the part of appellant or those having charge of train No. 14. The evidence also showed that the appellee had telegraph offices and operators at Indianapolis, Greencastle and Terre Haute. By rule 6 of the appellee's regulations, eastward-bound freight trains are entitled to the track, but if a half hour behind time, then westward-bound trains become entitled to the track as against the belated train.

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It may be fairly inferred, we think, that those operating train No. 19, as well as those in charge of train No. 14, were acquainted with the rules of the appellee as to the running of its trains; that those in charge of No. 19 knew that it was more than a half hour behind time; that they also knew that No. 14 would not for that reason leave Indianapolis until half an hour after its usual time; they further knew that it was the duty of those in charge of No. 19 to leave the track free for No. 14. No. 19 should therefore have run upon the side-track through the switch at the west end, and thus left the track free for No. 14. The neglect to do this probably caused the accident and the injury to the appellant.

The appellant insists however that the reasonable inference from the evidence is that the collision of the trains was due to the negligence of the appellee's train dispatcher; that had he notified the conductor of train No 19 of the time of the departure of train No. 14 from Indianapolis, and directed him to enter upon the side-track at Bridgeport from the west, the accident would not have occurred.

But conceding that the evidence tends fairly to show that the appellant's injury was due to the negligence of the appellee's train dispatcher, the question arises, was the appellee's train dispatcher the co-servant of the appellant? If they were fellow servants the appellant can not recover; if they were not, then he should recover. This is the only question in the case urged by the appellant.

The appellant insists with much confidence and earnestness that a train dispatcher is not the co-servant of a brakeman, because in the performance of his duties he is stationary while the brakeman is out upon the train.

The duties of the train dispatcher and the brakeman are quite distinct, but not more so than are the duties of the trackman or the switch-tender and the brakeman. Safety in running trains requires the prompt and faithful discharge of the duties of all these employees. Their co-operation and combined labor relate to the same object and are essential to the movement of trains upon the road. The mere fact that the duties of some of the employees are performed upon the train, and those of others at a particular place upon the road, does not as claimed by the appellant determine the question of their common employment. If the duties discharged by each relate to the same general object, they must be held to be

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fellow servants. It is enough if they are employed for the purpose of effecting the same general object. Whart. on Neg. § 230; *Slatery's Adm'r v. Toledo, etc., R. Co.*, 23 Ind. 81; *Wilson v. Madison, etc., R. Co.*, 18 id. 226; *Gormley v. Ohio, etc., R. Co.*, 72 id. 81. The court did not err in sustaining the demurrer. *Durgin v. Munson*, 9 Allen, 396.

Per Curiam.—It is ordered upon the foregoing opinion that the judgment below be affirmed, at the costs of the appellant.

Judgment affirmed.

HAINES V. ALLEN.

(78 Ind. 100.)

Trust -- charitable -- to suppress intoxication.

A bequest of money to the trustees of an organized church, in trust to apply the interest to the suppression of the manufacture and sale of intoxicating liquors, is valid.*

SUIT to set aside probate in part and to recover money. The opinion states the case. The plaintiff had judgment below.

D. T. Laird and W. H. Thomas, for appellants.

I. S. Moore and S. F. De Bruler, for appellees.

BICKNELL, C. C. The last will of James D. Allen contained the following provisions :

“Item 2. I will and bequeath to the trustees of the Methodist Episcopal Church, now organized in Rockport, Indiana, and to their successors in office, \$1,000, to be put at interest, and the interest to be applied, annually, to the payment of the salary of the preacher in charge at the time.

“Item 3. I will and bequeath to the aforesaid trustees, \$1,000, to be put at interest, and the interest to be appropriated, annually, to the suppression of manufacturing, selling or using of intoxicating liquors. Now should the said trustees refuse or neglect for two successive years to use the above named interest as directed, in

* See *Stonestreet v. Doyle* (75 Va. 366), 40 Am. Rep. 731.

either or both cases any one of my legal heirs shall have the right to draw out both principal and interest, and divide it equally between my heirs.

“Item 8. I will that the trustees, heretofore designated, shall superintend the carrying out of this will, and the winding up of my estate, by electing one of their body as executor; but if none of their body be willing to serve, then for them to agree on some good man, outside of their body; then after the said trustees have selected an executor, it is my will that they, as a body, shall continue to see that the will be fully and faithfully carried out.”

The will was dated March 16, 1878; the testator died August 1, 1878. At those dates the trustees of the Methodist Episcopal Church, in Rockport, were Lewis G. Smith, John Bayse, James P. Bennett, James H. Willian and William H. Thomas. Of these John Bayse undertook to act as executor of the will, but he soon resigned, and Willis Haines was appointed administrator with the will annexed *de bonis non*. The testator died a widower without issue; his only heirs at law were his brothers and sisters, and his nephews and nieces.

These heirs at law, in October, 1879, brought this suit against the administrator *de bonis non* and the trustees, stating in their complaint the foregoing facts and claiming that the bequest to the trustees was void for uncertainty, and that the money belonged to the heirs; and they prayed that the probate of the will, as to said item 3, should be set aside and declared void, and that said administrator should be required, in settling said estate, to pay said \$1,000 to the plaintiffs.

A demurrer to the complaint, for insufficiency of facts, was overruled, and the defendants refusing to answer, final judgment was rendered against them upon the demurrer, that the third item of the will is void; that as to said \$1,000 the testator died intestate, and that the plaintiffs are entitled to it, and that said administrator shall pay it to them in course of distribution.

From this judgment the defendants appealed. The only error assigned is overruling the demurrer to the complaint.

There is no brief on behalf of the appellees.

The complaint alleges that the will cannot be carried into execution, because it does not define what are intoxicating liquors, nor authorize the trustees to do so; and does not point out how the money shall be used to secure the object of the bequest, and be-

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cause if the trustees should fail or refuse to execute the trust, there is no beneficiary named in the will, with power to require the enforcement of the trust.

These objections cannot be sustained. The phrase "intoxicating liquors" means liquors that will intoxicate ; no definition of it is necessary.

The will need not point out any plan by which the objects of the bequest shall be accomplished. It is sufficient if the will appoints trustees, with power to appropriate the money in aid of the object named, in such manner as they shall think fit. *Witman v. Lex*, 17 S. & R. 88 (17 Am. Dec. 644) ; *Beekman v. Bonsor*, 23 N. Y. 298.

The will provides what shall be done, if the trustees fail to execute the trust, and where the bequest is for a general charity, such as a provision for a class of indigent persons, or for the suppression or alleviation of any of the forms of wretchedness and vice, and proper trustees are appointed to execute the bequest, it is not necessary that any individual beneficiary be named.

Preventing the use of intoxicating liquors, regarded as a means of promoting individual and social welfare, may be deemed a proper subject of charitable bequest, and whether the object shall be sought by the distribution of documents or by lectures, or by other reasonable and appropriate means, is a matter within the discretion of the trustees.

Where "certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity."

Where trustees capable of taking the legal estate were originally appointed, so that a valid use was in the first instance raised, and the case was thus brought within the jurisdiction of the Court of Chancery, that court will supply any defect which may arise in consequence of the death, or disability or refusal of the trustees to act. *Grimes' Ex'rs v. Harmon*, 35 Ind. 198 ; s. c., 9 Am. Rep. 690. The following cases support the foregoing conclusions, and show that the will under consideration was valid. *De Bruler v. Ferguson*, 54 Ind. 549 ; *McCord v. Ochiltree*, 8 Blackf. 15 ; *Vidal v. Girard's Ex'rs*, 2 How. 127 ; *Cruss v. Axtell*, 50 Ind. 49 ; *Craig v. Secrist*, 54 id. 419 ; *Board, etc., v. Rogers*, 55 id. 297 ; *Ex parte Lindley*, 32 id. 367.

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The court below erred in overruling the demurrer to the complaint. The judgment of the court below ought to be reversed, and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court below to sustain the demurrer to the complaint.

It is so ordered.

ROGERS V. WESTERN UNION TELEGRAPH COMPANY.

(78 Ind. 169.)

Sunday — telegraphing on — necessity.

A contract made on Sunday to telegraph the words, "Come up in morning, bring all," is void, and a breach of it will not warrant a recovery of the statutory penalty for failure to transmit.*

ACTION for statutory penalty. The opinion states the case. The defendant had judgment below.

H. Burns, for appellant.

C. G. McCord, for appellee.

ELLIOTT, C. J. This action was instituted by the appellant to recover the statutory penalty of one hundred dollars for the failure to transmit and deliver a telegraphic message.

The defense is, that the message was placed in the hands of the appellee on Sunday, and the contract for its transmission made on that day. The theory of the appellee and of the trial court is, that as the contract for transmitting the message was made on Sunday, it is void, and no penalty can be recovered for the failure to perform a void contract.

Appellant vigorously attacks the decisions holding that contracts

* See *Phila., etc., R. Co. v. Lehman* (56 Md. 209), 40 Am. Rep. 415, and note, 418; *Yonochi v. State*, post.

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made on the first day of the week, commonly called Sunday, are incapable of enforcement. The rule pronounced in these cases has long been the law of this State. There are very many cases enforcing this rule. *Reynolds v. Stevenson*, 4 Ind. 619; *Banks v. Werts*, 13 id. 203; *Love v. Wells*, 25 id. 503; *Davis v. Barger*, 57 id. 54; *Gilbert v. Vachon*, 69 id. 372; *Parker v. Pitts*, 73 id. 597; s. c., 38 Am. Rep. 155; *Mueller v. State*, 76 Ind. 310; s. c., 40 Am. Rep. 245. Some of them have carried the doctrine very far, possibly too far. In *Link v. Clemmens*, 7 Blackf. 480, it was held that a replevin bond executed on Sunday was invalid; and in *Catlett v. Trustees, etc.*, 62 Ind. 365; s. c., 30 Am. Rep. 197, the court decided that a subscription to a church made on Sunday was void. No rule is more firmly settled than the one under mention, and we can not now depart from it.

A penalty can not be recovered for the failure to perform an illegal contract. The statute does not apply to contracts which are without legal force. The evident intention of the legislature was to secure the performance of such contracts as imposed binding obligations upon the telegraph companies. The statute is a highly penal one, and we can not extend its operation by a liberal construction. *Western Union Telegraph Co. v. Axtell*, 69 Ind. 199. We certainly can not bring within its provisions a case, such as the present, where there is, in legal effect, no contract at all.

Courts can not declare, as matter of law, that the business of telegraphy is a work of necessity. There are doubtless many cases in which the sending and delivery of a message would be a work of necessity within the meaning of our statute. But we can not judicially declare that all contracts for the transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as a question of fact, from the evidence in each particular case.

We can not adjudge that the message which the appellee agreed to transmit is one which comes within the statute permitting the performance of works of necessity. It reads thus: "Come up in morning; bring all." These words are to be taken in their ordinary meaning, for there is nothing ascribing to them any other or different signification. Upon their face they imply a friendly invitation to visit the sender. Such a message can not be regarded as a "work of necessity," within the meaning of our statute.

The contract for the transmission of the message having been

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made on Sunday, and the message not being one which can be treated as entitling it to be transmitted as "a work of necessity," the contract for its transmission must be adjudged incapable of enforcement. As the appellee violated no valid contract, there is no foundation for the claim to the penalty prescribed by statute.

So far our consideration has been confined to the questions presented upon the first paragraph of the complaint and the answer thereto; we turn now to the questions presented upon the second paragraph of the complaint. This paragraph alleges the undertaking to transmit the message to have been entered into on the 5th day of October, 1879; that the message was telegraphed to Vincennes on that day; that the person to whom it was addressed inquired, at the proper office, for the message on the 6th day of that month, but that it was not delivered to him until the following day.

The appellant maintains that the defense that the contract for the transmission of the message was made on Sunday is not a sufficient answer to this paragraph. We can not assent to this view. The right to recover the statutory penalty depends upon the validity of the contract under which the message was received. Unless there is such a contract as imposed a binding obligation upon the telegraph company, there is no right to inflict punishment, for no legal duty has been violated. A violation of a legal duty is essential to a right of action for the recovery of the penalty. The retention of the message and of the consideration paid for its sending did not create a new contract. The only contract was that made on Sunday. What was afterward done did not constitute a new and different agreement.

The action, it must be borne in mind, is not one for the recovery of damages for a breach of contract. Nor is it a case for the redress of injuries arising from a tort. It is a civil action for the recovery of a penalty prescribed by statute, not for the purpose of making good any loss that the sender of the message may have sustained, but for the purpose of punishing a telegraph company for the negligent failure to transmit a message which it, by a valid contract, undertook to transmit. We can therefore derive no assistance from the cases which hold that for a tort committed on Sunday by common carriers, or for the matter of that, by anybody else, an action will lie.

It is settled that the retention of what has been received under a contract entered into on Sunday will not of itself be a ratification.

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Perkins v. Jones, 26 Ind. 499. If the retention of the consideration can not be regarded as constituting a ratification in cases where the relief sought is an enforcement of the right given by the contract, it certainly can not be so regarded where the object of the action is the recovery of a statutory penalty. It may well be doubted whether any thing short of an independent contract can, in such a case, create such a new duty as will supply sufficient foundation for an action to recover the penalty which the statute has affixed, by way of punishment, for a breach of duty.

Judgment affirmed.

RICHELS V. EVANSVILLE STREET RAILWAY COMPANY.

(78 Ind. 261.)

Municipal corporation — street railway — legislative authority for.

A street horse-railway may be placed and operated on a city street without compensation to abutting lot owners, the city having granted the right by ordinance in pursuance of legislative authority.

A special municipal charter may be amended by a general law.

THE opinion states the case.

C. Denby, A. Iglehart, W. F. Smith, D. B. Kumler and C. A. DeBruler, for appellants.

A. Gilchrist, V. Bisch and C. H. Butterfield, for appellees.

ELLIOTT, C. J. The questions which this record presents are thus stated by the appellants' counsel:

"1. Can a municipal corporation by ordinance authorize street railway companies to incumber its streets by laying and maintaining railroad tracks therein without express authority therefor by the legislature ?

"2. Has the corporation, appellee, obtained the necessary legislative sanction, to authorize the laying down and maintenance of its track in the streets of the city of Evansville?

"3. Can a street railway company, even with the proper legis-

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lative sanction, lay down and maintain its track in Second street, in the city of Evansville, without assessing and tendering damages to the abutting owners whose lots extend to the center of the street and upon which said track is laid?"

In an able argument, singularly forcible and clear, counsel for the appellants maintain that these questions require a negative answer.

We concur in the main with the appellants upon the answer to the first question. In asserting that the grant of authority to lay tracks upon the public streets of a city must be expressly conferred, the counsel limit the rule more rigidly than the authorities warrant. Such an authority must, it is true, be conferred by statute, but it is not indispensably essential that the grant should be stated in express words. If it is conferred by necessary implication, it will be upheld and enforced. But the grant must be conferred either by express words or be necessarily implied. Without such a grant the public streets can not be used by a railway corporation for the transportation of passengers for hire. The right to so use the streets is a franchise and such a franchise as can only exist by force of a legislative grant. The power to grant franchises is a high legislative trust, and it is a grave question whether the legislature can delegate it to municipal corporations. *People's Railroad v. Memphis Railroad*, 10 Wall. 38. We are not however called upon to decide whether the legislature can delegate this power, but we are required to decide whether such a power is embraced within the ordinary and incidental powers usually conferred upon or possessed by municipal corporations.

The city of Evansville was organized and is acting under a special charter granted prior to the adoption of the Constitution of 1852, and possesses the ordinary rights and powers of a municipal corporation. There is no provision in the original charter, nor in any of the various acts directly amending it, conferring power to grant to either steam or horse railway companies the right to use the streets of the city. The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant to a railway company the right to lay tracks and conduct the business of transporting passengers upon and over the streets of the municipality. Such a power is an extraordinary one, and one which cannot be implied from a charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such

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corporations. We are speaking now not of the intersection and crossing of streets by railway tracks, laid down in building lines of road which run through the city, but of railways exclusively doing business in the city and occupying the streets for that purpose.

The charter of a municipal corporation may be amended or repealed at the pleasure of the legislature. *Sloan v. State*, 8 Blackf. 361; *City of Indianapolis v. Indianapolis Home, etc.*, 50 Ind. 215; *Lucas v. Board, etc.*, 44 id. 524; 1 Dill. Mun. Corp., § 64. The power of the legislature to alter or amend the charter of Evansville cannot be, and as we understand counsel is not doubted. The question presented is not whether the legislature can alter or amend, but whether it has done so.

On the 4th day of June, 1861, an act was passed by the general assembly, entitled "An act to provide for the incorporation of street railroad companies," containing among others these provisions:

"SEC. 1. *Be it enacted by the General Assembly of the State of Indiana*, That any number of persons not less than five, being subscribers to the stock of any contemplated street or horse railroad company, may be formed into a corporation for the purpose of constructing, owning and maintaining street or horse railroads, switches or side-tracks, upon or through the streets of the cities or towns within the State, by complying with the following requirements: * * *

"SEC. 5. Such company may construct their track, switches, side-tracks or turn-outs upon the streets of said cities or towns under the following conditions and restrictions:" * * *

The contention of the appellants is that this is a general law and cannot apply to a city organized under a special charter, for the reason that such a charter can not be changed or altered except by a law directly amending or repealing the special charter. The question then which confronts us is this: Can the special charter of a municipal corporation be altered or amended by a general law?

Appellants refer us to the case of *Longworth's Ex'rs v. Common Council of City of Evansville*, 32 Ind. 322. Conceding that the doctrine of that case is sound, it cannot affect the question here in hand. That case decides that a special charter may be amended by a special law. But that is not the question under discussion. We are not considering whether special legislation is valid in such cases, but whether an act general in its terms, and with language broad enough to apply to all the cities of the State, howsoever incorporated,

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applies to and governs cities organized under special charters. Reference is also made to *State v. Branin*, 3 Zab. 484.

This case does decide that special charters to municipal corporations can not be destroyed by subsequent general enactments. We are unable to ascertain the ground upon which the court rested its decision, for there is neither argument nor authority adduced in support of the ruling. The proposition is in our opinion too broadly stated. If the legislature can alter or amend at will, it must rest with it to determine the manner in which the amendment shall be made. If it has the power to enact both general and special laws, it is the exclusive judge of which is the proper method. It is for the courts to determine, not which is the proper method in cases where either may be adopted, but what is the purpose and effect of the statute adopted. We think the true rule is that stated by Judge Dillon, who says: "It is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities; but they do so when this appears to have been the purpose of the legislature. If both the general and special acts can stand they will be construed accordingly. If one must give way it will depend upon the supposed intention of the law-maker, to be collected from the entire legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality in exclusion of the general enactment." 1 Dill. Mun. Corp., § 87. It is upon this general doctrine that the case of *City of Evansville v. Bayard*, 39 Ind. 450, proceeds. It was held in that case that the act of 1867, relative to the assessment of shares of bank stock, superseded the provision upon that subject in the special charter of the city of Evansville. We are clear that the legislature may by general legislation alter or amend the special charters of municipal corporations.

There is much more reason to doubt the power of the legislature to amend special charters by special amendatory acts, than there is for doubting its power to change or repeal them by general legislation. Our Constitution favors general legislation, and certainly as to the creation of new corporations, forbids all special laws save only in the cases expressly named as exceptions. There are many very well considered cases holding that under such a Constitution as ours special charters cannot be amended; but this question is not presented, and we do not decide it. We do decide however that

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the special charter of a municipal corporation may be amended by general legislation. Where the intention is to apply the act to cities organized under special charters, as well as those incorporated under general laws, that intention will govern and the act will be deemed the law not only of one class of cities but of all.

The language of the act of 1861 embraces all of the cities of the State. If there were any ambiguity in the language of the act we should be bound to give it this effect, for it is very evident that the intention was that all of the cities of the State might, if the governing officers should so desire, receive the benefit of the law. In no other way than by a general law could any city, no matter how incorporated, obtain street railways, for it is very certain that under our Constitution such corporations as street railways can only be created by general legislation.

We come now to the third and last question. It is the settled law of this State that the public takes only an easement in the streets of a city, and that if a steam railroad company lays its tracks upon the street, the owner of the fee is entitled to damages. *Terre Haute, etc., R. Co. v. Scott*, 74 Ind. 29. It is contended that this principle applies to horse railroads. The very decided weight of authority is against appellants on this point. The question has received very full and very able consideration from courts and text-writers, and the difference between steam and horse railroads has been very clearly established. Appellants have cited only one case which sustains their contention, and in our search we have been able to find no other. The decision in *Craig v. Rochester City, etc., R. Co.*, 39 N. Y. 404, was that of a divided court, three of its members dissenting from the prevailing opinion. The decisions of the same court in other cases contain doctrines which it is impossible to reconcile with that which prevailed in the case relied upon by the appellants. This is especially true of *Davis v. Mayor, etc.*, 14 N. Y. 506, 530, and *People v. Kerr*, 27 id. 188. The doctrine of the principal case under mention has not found favor outside of New York. The text-writers declare a different doctrine. Judge Dillon says: "The author regards the appropriation of a street for a horse railway, constructed and used in the ordinary mode, to be such a use as falls within the purpose for which the streets are dedicated or acquired under the power of eminent domain. When authorized or regulated by the public authorities, this is a public use within the fair scope of the intention of the proprietor when he dedi-

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cates the street or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use. There is solid ground to distinguish between horse railways in streets, as ordinarily laid and used, which do not exclude the public, and common railways, which are generally so constructed as altogether to exclude a portion of the street from public use in the accustomed modes." 2 Dill. Mun. Corp. (3d ed.), § 722. Judge Cooley recognizes the distinction between horse railroads and ordinary steam railroads, and expresses the opinion that the laying down of a steam railroad track does add a new burden, entitling the owner of the fee to compensation, but that laying and operating a horse railroad does not. We quote his language :

"Perhaps the true distinction in these cases is not to be found in the motive-power of the railway, or in the question whether the fee-simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or on the other hand, is a mere local convenience. When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving. The appropriation of a country highway for the purposes of a railway, on the other hand, is neither usual nor often important; and it can not with any justice be regarded as within the contemplation of the parties when the highway is first established. And if this is so, it is clear that the owner can not be considered as compensated for the new use at the time of the original appropriation." Cooley Const. Lim. 556.

The doctrine of the eminent jurists, from whose works we have quoted, is fully sustained by the adjudged cases. *Elliott v. Fair Haven, etc., R. Co.*, 32 Conn. 579; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Jersey City, etc., R. Co., v. Jersey City, etc., Horse R. Co.*, 20 id. 61; *Cincinnati, etc., Street R. Co., v. Cumminsville*, 14 Ohio St. 523; *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194; s. c., 9 Am. Rep. 461; *Attorney-General v. Metropol-*

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itan R. Co., 125 Mass. 515 ; s. c., 28 Am. Rep. 264 ; *Brown v. Duplessis*, 14 La. Ann. 842 ; *Savannah and Thunderbolt R. R. Co. v. Mayor, etc.*, 45 Ga. 602 ; *Peddicord v. Baltimore, etc., R. Co.*, 34 Md. 463.

In the recent case of *Hiss v. Baltimore, etc., R. Co.*, 52 Md. 242, s. c., 36 Am. Rep. 371, express and full approval is given to the doctrine maintained by Judge Dillon and by Judge Cooley. The Supreme Court of Iowa has very recently given this general subject a thorough consideration in the case of *Stanley v. City of Davenport*, 54 Iowa, 463 ; s. c., 37 Am. Rep. 216, and it was there held that a municipal corporation had no authority to grant a right to a street railway to use steam as the motor power, but it was conceded that ordinary horse railways might be operated upon the streets without imposing an additional burden upon the owner of the fee.

The question has been so fully discussed in the cases and textbooks, to which we have referred, that nothing of importance or of interest can be added. The rule sustained both by principle and authority is, that a horse railway may be placed and operated upon the streets of a municipal corporation without increasing the burden of the servitude, and that the owner of the fee is not entitled to compensation because of such use of the streets upon which his property abuts.

Judgment affirmed.

EVERHART V. TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

(78 Ind. 232.)

Negligence — railroad — interloper on car.

On the request of a railway employee, the plaintiff, not in the company's employment, got on a slowly moving car on a switch and applied the brake, and while so occupied was injured by a collision with other cars, negligently produced by other servants of the company. *Held*, that he had no remedy against the company.*

ACTION of damages for personal injury by negligence. The opinion states the case. The defendant had judgment below.

C. P. Jacobs, for appellant.

* See note, 40 Am. Rep. 226.

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J. G. Williams, B. Harrison, C. C. Hines and W. H. H. Miller,
for appellee.

WORDEN, J. Complaint by the appellant against the appellee in two paragraphs. The first alleges "that the defendant is a corporation, organized under the laws of the State of Indiana, and as such, owns and operates a railroad line from Indianapolis to Terre Haute, Indiana, and also certain lines of track laid down and used for switching and making up freight and passenger trains in the city of Indianapolis, Indiana; that on the 20th day of August, 1879, the plaintiff (who is a minor) was returning home along South West street, in said city, and on coming to the point where the tracks of the defendant cross said West street, was stopped by several flat or coal cars which were moving slowly across said street; that at this moment a servant and employee of the defendant, who was employed on and about said switching tracks, requested the plaintiff to get upon one of said coal cars and apply the brake thereto so as to bring it to a full stop; that the plaintiff acceded to this request and got upon one of the said coal cars, and laid hold of the brake wheel thereof to do as he had been requested; that certain other employees of the defendant who had charge of a switching engine belonging to the defendant, to which were attached some other empty coal cars, undertook to make what is known as a running switch, and carelessly, negligently, willfully and recklessly cut off several coal cars from the engine, which under a considerable speed ran on eastward, and willfully, recklessly, carelessly and negligently left them without any brakeman or other person to take care of them or stop them, and thus left alone they ran into and collided heavily with the car on which the plaintiff was, and the shock threw the plaintiff off and upon the ground under said cars, and the cars ran against and upon him, mangling him severely, without the fault or negligence of the plaintiff and in a manner which he was powerless to prevent; that in the crush of the wheels created by the collision aforesaid, the bones of his right foot were broken and mashed, his right leg skinned for a considerable distance, his left foot badly bruised and a deep gash cut in his groin, and he has been ever since confined to his bed, and has suffered and still suffers great pain and anguish therefrom. He is informed and believes that these injuries are of a permanent character, and that his left foot is crippled for life, and that he will be confined to his bed for many months to come.

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* * * He further avers that the loosening of said cars from the engine on the running switch was so sudden that he could take no means to avoid the injury, as the cars were upon him before he could see or provide for the danger."

The second paragraph alleges the organization of the defendant as a corporation under the laws of the State of Indiana, and that as such corporation, it "owns and operates a railroad line leading from Indianapolis westward across White river, and also certain lines of track used principally for switching and as side tracks, which have been laid down in and upon a public street in the city of Indianapolis, called Louisiana street, and along the same from Tennessee street to White river, within the limits of said city; that at a point or place on said Louisiana street a certain other street of said city, called West street, crosses said Louisiana street, and the said crossing has been filled with railway tracks, main and side-tracks, and from thence westward to said White river, upon and along which the defendant's engines and cars are almost constantly moving, attached to coal and freight cars; that on the 20th of August, 1879, the plaintiff (who is a minor) was returning home and walking upon the sidewalk of South West street in said city of Indianapolis, and coming to its intersection with said Louisiana street, across which his route lay, was walking carefully across said last-named street, and when about two-thirds of the way across said Louisiana street, found his progress barred by several empty coal or flat cars which were slowly moving westward, entirely without any person to manage or stop them, and unattached to any engine; that as plaintiff stopped, a servant and employee of the defendant, who was engaged at the time in looking after and oiling the defendant's cars upon and along said tracks, directed the plaintiff to climb upon said empty cars and apply the brakes to them and stop them; plaintiff did so without any delay, and while the cars were slowly moving westward along one of the tracks aforesaid applied the brakes with all his force to stop the car he was on; that during this time certain servants and employees of the defendant in charge of one of the defendant's switching engines, were engaged in moving and switching cars therewith at the western extremity of Louisiana street, near the bridge over White river, where the side or switching tracks join or unite with the main track used by the defendant, and with said engine pushed certain empty flat coal cars from the west of the said junction down upon the side-track

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on which were the cars upon one of which the plaintiff was standing, and at the brake thereof, and willfully, recklessly and negligently allowed said coal cars to run upon and along said track, disconnected and cut off from the engine that had started them, entirely wild and without any person upon them to control the brakes thereof, and at a dangerous rate of speed, and the motion they had thereby acquired drove and propelled them swiftly, and all unseen by and without the knowledge of this plaintiff, who was engaged at the time in tightening the brakes on the car he was upon, and suddenly ran against the cars on which the plaintiff was riding with great force, and the shock of the collision threw the plaintiff off the car and upon the track and under the wheels of the cars which ran upon him, wounding him in several places, and mangling his foot as hereinafter set forth. And the plaintiff says he had no reason to expect, and did not expect, and did not know that the defendant's agents or servants or any other person would allow said cars to be pushed along and upon said side-track from the west end thereof while the car he was on was moving along said track westward, nor that they would push said cars down said track and disconnect them from the engine and allow them to run wild and unattended by any person to manage the brakes thereon, nor that any cars were coming, until they were so near as to make a collision inevitable; that he had no means or knowledge whereby he could foresee the danger, and that it came so suddenly upon him that he was unable to prevent it. He avers that he was not guilty of any negligence or carelessness at or before the time of the collision, and that as soon as he was aware of the danger he used every effort to prevent it, but without success. He says that if the cars approaching from the west had been properly manned by a sufficient number of persons to apply the brakes in time the collision would have been prevented, and that if the defendant's agents or employees in charge of the switch engine had taken proper care, and the means at hand to know whether the track was clear, the injury to the plaintiff would not have happened; that if the defendant's servants in charge of the engine had not pushed the cars down the side-track with great speed, and willfully and recklessly suffered them to run wild and unattended, the collision would not have taken place; that in getting upon the car to stop it by the use of the brake, he did so solely at the request of the defendant's servant and employee as aforesaid, and without any reward or re-

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muneration, or promise or expectation of any reward or remuneration."

The paragraph then proceeds to allege the extent of the plaintiff's injuries, and the expenses incurred, and claims judgment in the sum of \$20,000.

A demurrer to each paragraph of the complaint for want of sufficient facts was sustained and final judgment rendered for defendant. Judgment affirmed on appeal to General Term.

On the authority of the cases of *Degg v. Midland R. Co.*, 1 H. & N. 773; *Flower v. Pennsylvania R. R. Co.*, 69 Penn. St. 10; s. c., 8 Am. Rep. 251, and *New Orleans, etc., R. Co., v. Harrison*, 48 Miss. 112; s. c., 12 Am. Rep. 356; cases which seem to us to be entirely in point in principle, we feel constrained to hold that on the facts stated the defendant is not liable, and therefore that the ruling below was right.

If the plaintiff were to be regarded as having been the servant of the defendant, it would seem that he could not recover for the injury caused by the negligence of his fellow servants. But it seems to us, that on the facts stated in either paragraph of the complaint he can not be regarded as having been the servant of the defendant. See *Kelly v. Johnson*, 128 Mass. 530; s. c., 35 Am. Rep. 398. He was not requested or directed to man the brake by any one that is shown to have had authority from the defendant to make such employment.

In the first paragraph it is alleged that "a servant and employee of the defendant, who was employed on and about said switching tracks," requested the plaintiff to get upon one of the cars and apply the brake, etc.; and in the second paragraph it is averred that "a servant and employee of the defendant, who was employed at the time in looking after and oiling the defendant's cars upon and along said tracks," directed the plaintiff, etc.

The plaintiff was a mere volunteer, consenting, at the request or direction of an employee of the defendant to perform service which should have been performed by the employees themselves; and while he can not be regarded as an employee, he is in no better condition than if he had been.

Nor is he in any better condition legally than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because as we have seen, he was not requested or directed to get upon the car and apply the brake

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by any one having power from the defendant to authorize him to do so. The defendant owed him no duty either as an employee, passenger or traveller upon a highway crossed by the railroad. Under the circumstances, the authorities above cited make it clear that the defendant is not liable. If there had been an urgent necessity for some one other than an employee of the defendant to get upon the car or cars and apply the brakes, in order to prevent a destruction of human life or valuable property, possibly the case might be different; but no such necessity was shown.

The judgment below is affirmed with costs.

Judgment affirmed.

**MARY V. CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS
RAILROAD COMPANY.**

(78 Ind. 233.)

Negligence — railroad company — dangerous structure — interloper.

The plaintiff, without invitation or business, intruded upon a visibly ruinous but uninclosed freight house of the defendants, used only for storage, and while there a sudden storm blew a fragment of the building upon him and injured him. *Held*, that he was remediless.

ACTION of damages for personal injury by negligence. The opinion states the case. The defendant had judgment below.

W. A. Kittinger, A. F. Harrison and W. R. Pierse, for appellant.

A. C. Harris, H. H. Poppleton, J. A. Harrison and R. Lake, for appellee.

MORRIS, C. The appellant sued the appellee for damages alleged to have been sustained by him through the negligent failure of the appellee to repair a building standing on its ground and formerly used by it as a freight house, situate within the limits of the city of Anderson, Madison county, Indiana.

The appellee answered the complaint by a general denial. The cause was submitted to a jury for trial. The appellant having introduced his evidence to a jury, the appellee demurred to it and

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the appellant joined in demurrer. The court sustained the demurrer, and the appellant excepted.

The ruling of the court upon the demurrer is assigned as error.

The facts which the evidence proved, or tended to prove, are substantially as follows :

The appellee, called in the evidence the "Bee Line," on the 3d of April, 1878, owned and operated a railroad, passing through the town of Anderson, Madison county, Indiana. In the south-east part of said town it crosses the "Pan Handle" railroad, the course of the appellee's road being nearly east and west, and that of the Pan Handle from north-west to south-east. On the west side of the Pan Handle tracks, and north of the Bee Line tracks, there was a passenger depot. A freight house had been built, several years ago, about twenty feet west of the passenger depot, with a platform on the south side and west end of the same. The surface of the earth on which the freight depot stood inclined to the north ; the house and platform rested on stone pillars. Next to the track, the platform and floor were some two feet above the level of the track, and on the further side, some seven or eight feet above the surface of the ground. The space between the platform and floor and the earth was open. A year or two before the alleged accident, the appellee moved its general freight business to a depot nearer the city, and the freight house in question was no longer used as the general freight house of the appellee, though still used for some purposes, such as storing the appellee's wood and lumber. A highway or avenue led from the crossing northwardly to the town dividing the angle formed by the railroads. The appellee owned half an acre of ground between its track and this highway or avenue, upon which the depot stood.

Patrick Lary, the father of the appellant, lived near the Bee Line tracks, and some distance west of the crossing. At a point up the avenue from the crossing, a road leads west toward his home. A heading factory stood some distance south-east of the crossing. The appellant, then twenty years of age, was, on the 3d day of April, 1878, employed in this factory as a "joiner," and had been employed in it as a common laborer for sometime before. On the 3d of April, 1878, it rained, so that the factory shut down by ten or eleven o'clock in the forenoon. The appellant, in company with several other boys, started for home, and when they reached the crossing they walked along the Bee Line tracks until they reached

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the old freight house. The appellant had been in the habit of passing this freight house almost daily for sometime. He noticed, in July, 1877, that a part of the roof of the building was off, but had never given it further notice. As the appellant and his companions came up the Bee Line track, they were throwing mud balls at each other. It was raining, and they ran under the platform of the freight house, where they continued their sport of throwing mud balls and pitching pennies. The appellant, to avoid the mud balls thrown at him by his companions, ran behind one of the stone pillars supporting the platform on the west end of the freight house. They had been playing some ten or fifteen minutes, when a severe and sudden blast of wind struck the freight house, while the appellant was behind the pillar. It tore off a piece of the roof of the building some ten feet square. The appellant, being frightened by the noise, ran out in the open space, and looking up saw the piece of the roof blown off, in the air. He ran toward the avenue, but before or as he reached the edge of it, this fragment of the roof fell upon and crushed him to the earth. The appellant was bruised and internally injured by the accident, and had not, at the time of the trial, entirely recovered from the injury.

Upon the facts thus stated, can the appellant maintain this action ?

There is no testimony tending to show that the appellant was at the freight house by the invitation of the appellee, nor that he was there for the purpose of transacting any business with the appellee. The appellant intruded upon the premises of the appellee, and is not therefore entitled to that protection which one, expressly or by implication, invited into the house or place of business of another, is entitled to. The appellant was a trespasser, and as such he entered upon the appellee's premises, taking the risks of all the mere omissions of the appellee as to the condition of the grounds and buildings thus invaded without leave. We do not wish to be understood as holding or implying that if, on the part of the appellee, there had been any act done implying a willingness to inflict the injury upon the appellant, it would not be liable. But we think there is nothing in the evidence from which such an inference can be reasonably drawn. The building could be seen by all ; its condition was open to the inspection of every one ; it had been abandoned as a place for the transaction of public business ; it was in a state of palpable and visible decay, and no one was au-

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thorized, impliedly or otherwise, to go into or under it. Under such circumstances, the law says to him who intrudes into such a place, that he must proceed at his own risk.

In the case of *Pittsburg, etc., Ry. Co. v. Bingham*, 29 Ohio St. 364; s. c., 23 Am. Rep. 751, the question was: "Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or maintenance of its station house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road; but are there without objection by the company, and therefore by its mere sufferance or permission?" The court answered this question in the negative.

In the case of *Hounsell v. Smyth*, 7 C. B. (N. S.) 731, the plaintiff fell into a quarry, left open and unguarded on the unclosed lands of the defendant, over which the public were permitted to travel; it was held that the owner was under no legal obligation to fence or guard the excavation unless it was so near the public road as to render travel thereon dangerous. That the person so travelling over such waste lands must take the permission with its concomitant conditions, and it may be, perils. *Hardcastle v. South Yorkshire Ry. Co.*, 4 H. & N. 67; *Sweeney v. Old Colony, etc., R. Co.*, 10 Allen, 368; *Knight v. Abert*, 6 Barr, 472.

After reviewing the above and other cases, Judge BOYNTON, in the case of *Pittsburg, etc., Ry. Co. v. Bingham, supra*, says: "The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition, where the person receiving the injury was not in or near the place of danger by lawful right; and where such owner assumed no responsibility for his safety by inviting him there, without giving him notice of the existence or imminence of the peril to be avoided." In the case from which we have quoted, the intestate of the plaintiff was at the defendant's station house, not on any business with it, but merely to pass away his time, when by a severe and sudden blast of wind, a portion of the roof of the station house was blown off the building and against the intestate, with such force as to kill him. The case, in its circumstances, was not unlike the one before us. *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525; *Murray v. McLean*, 57 Ill. 378; *Durham v. Musselman*, 2 Blackf. 90 (18 Am. Dec. 133).

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In the case of *Sweeny v. Old Colony etc., R. Co.*, 10 Allen, 368, the court say: "A licensee, who enters on premises by permission only, without any enticement, allurements or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils." *Carlton v. Franconia Iron and Steel Co.*, 99 Mass. 216; *Harris v. Stevens*, 31 Vt. 79, 90; *Wood v. Leadbitter*, 13 M. & W. 838.

The evidence in this case brings it, we think, within the principles settled by the above cases.

The appellant contends that the evidence shows that the appellee was guilty of gross negligence in not repairing its freight house, and that such negligence renders it liable, though he entered upon its premises without invitation or license, as a mere intruder, and was, while such intruder, injured; and in support of this proposition, we are referred to the following cases: *Lafayette, etc., R. Co. v. Adams*, 26 Ind. 76; *Indianapolis, etc., R. Co. v. McClure*, id. 370; *Gray v. Harris*, 107 Mass. 492; s. c., 9 Am. Rep. 61; *Isabel v. Hannibal, etc., R. Co.*, 60 Mo. 475.

In the first of the above cases, the court held, that where the negligence of the company was so gross as to imply a disregard of consequences or a willingness to inflict the injury, it was liable, though the party injured was not free from fault. In the second case, it was held that a railroad company, not required to fence its road, would not be liable for animals killed on its road, unless guilty of gross negligence. The phrase "gross negligence," as used in these cases, means something more than the mere omission of duty; it meant, as shown by the evidence in the cases, reckless and aggressive conduct on the part of the company's servants. "Something more than negligence, however gross, must be shown, to enable a party to recover for an injury, when he has been guilty of contributory negligence." *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; s. c., 30 Am. Rep. 185. There was in the cases referred to in 26 Indiana something more than negligence. As in the case of *Indianapolis, etc., Ry. Co. v. McBrown*, 46 Ind. 229, where the animal was driven through a deep cut, eighty rods long, into and upon a trestle work of the company, there was aggressive malfeasance. In the Massachusetts case, the court held that a party building a dam across a stream must provide against unusual floods. We do not think these cases applicable to the one before us.

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There could be no negligence on the part of the appellee, of which the appellant can be heard to complain, unless at the time he received the injury the appellee was under some obligation or duty to him to repair its freight house. "Actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge." *Pittsburg, etc., Ry. Co. v. Bingham, supra*; *Burdick v. Cheadle*, 26 Ohio St. 393; s. c., 20 Am. Rep. 768; *Town of Salem v. Goller*, 76 Ind. 291. We have shown that the appellee owed the appellant no such duty.

The judgment below should be affirmed.

Per Curiam.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

It is so ordered.

JOHNS V. STATE.

(78 Ind. 382.)

Sunday — constitutionality of law of.

The statute prohibiting labor on Sunday is constitutional, although it provides that it shall not affect those who conscientiously observe the seventh day as the Sabbath. (*See note, p. 579.*)

CONVICTION of Sabbath-breaking. The opinion states the case.

H. N. Spaan and *F. Heiner*, for appellant.

D. P. Baldwin, attorney-general, *W. W. Thornton*, and *J. B. Elam*, prosecuting-attorney, for State.

ELLIOTT, C. J. [Omitting a minor point.] The second question is this: Is the 95th section of the act of April 14, 1881, in conflict with any constitutional provision? A long line of decisions affirms the validity of this law. It has been sustained against repeated assaults. It has been a part of the statutory law of the State since its organization. Cases old and new have sustained and enforced it. *Rogers v. Western Union Telegraph Co.*, 78 Ind. 169,*

**Ante*, 558.

and authorities cited ; *Mueller v. State*, 76 Ind. 310 ; s. c., 40 Am. Rep. 245. Like statutes have been upheld in almost all of the States of the Union.

It is asserted that an objection against this statute is now urged, which has not been presented in any of the numerous cases decided by this court. This objection is, that the proviso which reads thus, " but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath," brings the section under examination into conflict with section 23 of the Bill of Rights. This objection can not prevail. The constitutional provision referred to reads thus : " The general assembly shall not grant to any citizen, or to any class of citizens, privileges or immunities which, upon the same terms, shall not belong equally to all citizens." The statute under immediate mention does not grant immunities to one class of citizens which, upon the same terms, shall not belong to all. The terms upon which the immunity may be enjoyed are granted to all, and denied to none. All citizens accepting these terms may claim the immunity. All who observe the seventh day of the week are entitled to the immunity provided. There is nothing restricting any citizen from enjoying it upon the same terms with all his fellow citizens.

— The framers of the statute meant to leave it to the consciences and judgments of the citizens to choose between the first and the seventh day of the week. On one or the other of these days they must refrain from common labor. Which it shall be is to be determined by their own consciences. It was not the purpose of the law-makers to compel any class of conscientious persons to abstain from labor upon two days in every week. Without the proviso which is said to break down the law, a large number of citizens would be compelled to lose two days of labor. One day, because of their conscientious convictions of religious duty, and one by the command of the municipal law. We know that there are sects of Christians who conscientiously believe the seventh day to be the divinely ordained Sabbath. We know too that there is a great people, who, for many centuries, and through relentless persecution and terrible trials, have clung with unswerving fidelity to the faith of their fathers that the seventh day is the true Sabbath. If the proviso were wrenched from the statute, these classes of citizens would be compelled, in obedience to their religious convictions, to rest from labor on the seventh day, and by the law also compelled to refrain

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from common labor on the first day of the week. A leading and controlling element of our system of government is, that there shall be absolute freedom in all matters of religious belief. The statute here under examination is framed in harmony with this all pervading and controlling principle. It was meant, not to secure special privilege to any class, but to afford free opportunity to all to observe that day, which in their conscientious judgments, they believe to be that upon which good men should cease from labor.

The opinion in *Fry v. State*, 63 Ind. 552 ; s. c., 30 Am. Rep. 238, vindicates the constitutionality of the statute we are discussing. It was there held that it is competent for the legislature to restrict the sale of railway tickets to persons who have complied with certain prescribed terms, and to punish persons selling tickets who had not complied with the requirements of the law. As was there said by HOWK, C. J., as the organ of the court, "It is neither the province nor the duty of the courts to call in question either the policy or the wisdom of any act of legislation."

Stoutly sustaining the views here declared are these cases : *City of Cincinnati v. Rice*, 15 Ohio, 225 ; *City of Canton v. Nist*, 9 Ohio St. 439. The Ohio cases do indeed go farther, for they declare that a statute without this exception would not be valid. These cases are entitled to great consideration, not only because they are ably reasoned, but also because the Constitution of Ohio is very like our own.

Judgment affirmed.

NOTE BY THE REPORTER.—The California judges are not unanimous as to the constitutionality of a law forbidding the keeping open of saloons on Sunday. In *Ex parte Moser*. March 10, 1882, a majority of the court held it valid, on the ground that the legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, there is no power outside of its constituent which can sit in judgment upon its action. It is not the province of the judiciary to pass upon the wisdom and policy of legislation. In this view THORNTON, MYRICK, McKEE, J.J., and MORRISON, C. J., concurred. MYRICK, J., observed: "By virtue of her sovereignty, the State has guaranteed freedom of religious opinion and worship to all religious bodies and people within her boundaries. But in granting those guarantees, she did not relinquish to religious bodies, nor divest herself of the power to establish a day of rest as a municipal institution for the people of the State. That power was reserved to be exercised over all the members of the body politic, without reference to whether they are Christians or Hebrews, followers of Confucius, of Gautama Buddha, of Mahomet or of Joe Smith ; or those who say in their hearts, 'There is no God.' Subject to that reservation, every citizen of the State is left free to his intellectual convictions and emotional fervors upon subjects of the unknown and unknowable. All are equal in the laws, in positions under the law, and in the administration of the government. No legal distinction or discrimination can be made between them. But thus protected, all are subject to the municipal institutions es-

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established by the State. And in establishing a day of rest as one of those institutions, the State has the right to determine what day ought to be set apart for that purpose, and how it ought to be observed by the people. She is not bound by any constitutional obligations to the selection of any particular day. Any one in seven, or in six or in eight — either the first or the seventh day of the week, or any other day, may be appropriated by her for that purpose. Sunday is only a designation for the first day of the week; and to deny the power of the State to set apart that day, or any other day, is to deny the power to set apart a day of rest as a municipal institution at all." Adverting to the argument that Jews and Seventh Day Adventists are thus compelled to keep holy a day against their consciences, he adds: "In such views, men simply deceive themselves by words; for the State has not set apart Sunday for a day of rest as a *religious* institution, nor does she impose observances of the day upon churches or on church members, nor are religious commemorations or ceremonies prescribed or enforced. The duty of observing the day is imposed on the people of the State as members of the body politic, without reference to the religious faith and worship of any. And as a day of rest, Sunday is not set apart as a *holy* day, but is set apart as a legal holiday." McKINSTRY, ROSS, and SHARPSTEIN, JJ., dissented. The latter observed: "But it is claimed that it can be supported on the ground 'that one day's rest in seven is needful to recuperate the exhausted energies of body and mind.' In a government modelled after the Republic of Plato, that would doubtless constitute a sufficient ground for legislative interference. But if the government has the power to do that, why should it not assume all the functions which Plato assigned to it? In the language of Macaulay, 'why should it not take away the child from the mother, select the nurse, regulate the school, overlook the play-ground, fix the hours of labor and recreation, prescribe what ballads should be sung, what tunes shall be played, what books shall be read, what physic shall be swallowed — why should it not choose our wives, limit our expenses, and stint us to a certain number of dishes, of glasses of wine, and of cups of tea?' Why should it not fix the hours of retiring at night and rising in the morning? Experience has demonstrated that a certain number of hours' sleep in every twenty-four are needful to recuperate the exhausted energies of body and mind."

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY V.
YUNDT.

(78 Ind. 373.)

Negligence — railroad — absence of flagman from street crossing.

In an action for personal injury sustained by a traveller upon a city street by collision with a railway train at a crossing, evidence of the absence of the flagman customarily stationed there to the plaintiff's knowledge is competent.*

ACTION of damages for personal injury by negligence. The opinion states the case. The defendant had judgment at trial, reversed at General Term.

T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks,
for appellant.

* See *Hart v. Chicago, etc., R. Co.*, ante, 93.

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R. Hill and J. W. Nichol, for appellees.

WORDEN, J. Action by the appellees against the appellant to recover damages for an injury suffered by the female plaintiff, in consequence of the alleged carelessness and negligence of the defendant in running its train of cars across a public street of the city of Indianapolis, along which street the plaintiffs were passing with a horse and buggy, whereby the horse became frightened and ran away, doing the injury.

Trial by jury ; verdict and judgment for the defendant. On appeal to General Term the judgment was reversed, and from the judgment of reversal the defendant appeals to this court.

On the trial there was evidence tending to show that Noble street running north and south is a much travelled street, and is crossed by the defendant's railroad in a populous part of the city ; that the defendant had erected a building just north of its south or main track and just east of the east line of the street, which obstructed the view of trains approaching from the east from persons on Noble street north of the line of the defendant's tracks ; that as the plaintiffs were driving south on Noble street toward the railroad, and as they got to a point about opposite to the center of the building mentioned, a train backed suddenly along from the east, at which the horse took fright and ran away and did the injury.

A bill of exceptions shows, that at the proper time Mrs. Yundt, being examined as a witness, was asked by her counsel to state as follows :

“ State whether just prior to or at the time of the accident about which you have testified, you observed any person at or near the crossing of the defendant's road on Noble street, engaged in giving signals of an approaching train on defendant's track, and if so state who he was, where he was standing, and what signals, if any he gave.

“ To this question the defendant objected upon the grounds that it was immaterial, irrelevant and incompetent ; and thereupon counsel for the plaintiffs stated to the court that they proposed to prove by said witness and such other witnesses as they intend to call, that several years prior to the accident complained of, the defendant had caused to be erected at the crossing where the accident occurred, a signal house, which had been continued and maintained up to the time the accident occurred, and that it had at

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such time placed at said crossing a watchman or flagman, whose duty it was to give notice by appropriate signals to persons desiring to cross said track at said place, of the approach of trains on said track, and that it had kept and maintained said person at said place from the time aforesaid down to within a few days of the said accident, and that he was then withdrawn without any notice to the public; and that the plaintiffs had been accustomed for several months prior to said accident to cross said track on said street, and had observed the presence and signals of said flagman, and at the time of said accident had no personal knowledge that the said flagman had been withdrawn; and that just before attempting to cross said track at the time of said accident, she and her co-plaintiff looked for said flagman, and the signals which he had been in the habit of giving of approaching trains, and did not see a watchman or flagman, or any signal whatever of the approach of any train. Which objection was by the court sustained and the evidence excluded, to which ruling of the court the plaintiffs at the time excepted."

We are of opinion that the court erred in rejecting the evidence thus offered.

The danger of injury may be much greater where a railroad crosses a street in a city or populous town, than where it crosses a highway in the open country, or other circumstances may make such crossing in one place more dangerous than in another; and it may be laid down as settled law, that the greater the danger the more care is required by ordinary prudence, on the part of the passer-by and the railroad company, the one to avoid and the other to prevent injury. *Bellefontaine Ry. Co. v. Hunter*, 33 Ind. 335; *Indianapolis, etc., R. Co. v. Hamilton*, 44 id. 76; *Pennsylvania Co. v. Krick*, 47 id. 368; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Pennsylvania R. Co. v. Barnett*, 59 Penn. St. 259; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Continental Improvement Co. v. Stead*, 95 U. S. 161.

There may have been no law or ordinance which required the defendant to keep a flagman at the crossing to warn passers-by of approaching trains, but it does not therefore follow that the absence of such flagman or signals was not a proper circumstance to be considered by the jury, in connection with all the other circumstances of the case, in determining the question of the defendant's negligence. See the case above cited from 44 Ind. 76, and the case from 113 Mass. 366.

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In the case of *McGrath v. New York Central, etc., R. Co.*, 59 N. Y. 468; 63 id. 522; s. c., 17 Am. Rep. 359, evidence like that offered in this case was held to be competent on the question of the defendant's negligence. The court however does not appear to have been unanimous in opinion upon the point. But the decision was subsequently followed by an undivided court, in the case of *Casey v. New York Central, etc., R. Co.*, 78 N. Y. 518. There the court said: "So also the question as to the habit of the company in keeping a flagman at the place in question was competent, in reference to the degree of care which the company had exercised. The evidence was admissible within the rule laid down in several reported cases." Citing some cases, among which is that in 63 N. Y. 522. See also Whart. on Neg., § 798, and authorities there cited.

It is clear enough, as we think, that the evidence offered was competent to be considered on the subject of the imputed negligence of the defendant. But it was intimated in the case above cited from 63 N. Y. on the authority of a previous ruling in the same case (59 N. Y. 468), that the evidence was not competent to be considered on the subject of the plaintiff's negligence.

We however are not satisfied with that view of the question. If the defendant had, for a considerable time before the accident, kept a flagman at the crossing to give signals on the approach of trains, and if the plaintiffs had been in the habit of crossing the railroad at that place and observing the signals, and if on the occasion of the accident no signal was given, the plaintiffs not knowing that the services of the flagman had been dispensed with, these facts might in our opinion, be considered by the jury, in connection with all the other circumstances, in determining whether or not the plaintiffs were free from contributory negligence.

The absence of any signal of an approaching train on the occasion did not dispense with the necessity, on the part of the plaintiffs, of using their natural senses and faculties in order to avoid danger, nor relieve them from the exercise of care and prudence commensurate with the danger; but the facts offered to be proved might well be considered, in connection with the other evidence in the case, in determining whether they did exercise such care and prudence.

Suppose instead of a flagman stationed at the crossing, the defendant had had gates placed across the street, kept open when the way was clear and shut when trains were passing or about to pass.

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and the plaintiffs had come along, and finding the gates open, had driven through, and met with the injury complained of, is it not clear that the facts would have been competent to be considered in determining whether or not the plaintiffs were guilty of contributory negligence?

The case supposed does not differ in principle from the one here. See the case of *North Eastern Ry. Co. v. Wanless*, 9 Eng. Rep. (Moak) 1.

Wharton says: "The better opinion is, that it is a duty for the road to place a flagman at all crossings where there is a flow of travellers and a frequent passage of trains." Whart. on Neg., § 798.

However this may be, the evidence offered would tend, with all the other circumstances shown, to throw some light on the subject of the plaintiffs' contributory negligence as well as that of the defendant's negligence. This view is supported by the general course of reasoning and the authorities cited in the case of *Sweeny v. Old Colony, etc., R. Co.*, 10 Allen, 368. See also, as having some bearing upon the question, *Bonnell v. Delaware, etc., R. Co.*, 39 N. J. 189; s. c., 1 Thomp. on Neg. 404.

As the exclusion of the evidence offered was a sufficient ground for the reversal of the judgment rendered at Special Term, it is unnecessary to inquire whether there was any other ground for reversal.

The judgment of reversal at General Term is affirmed, with costs, and the cause remanded.

Judgment affirmed.

RICHARDSON V. EAGLE MACHINE WORKS.

(78 Ind. 432.)

Master and servant — breach of contract — remedy — former judgment.

A servant wrongfully discharged may sue for breach of contract or for wages earned, and in the former case a recovery equal to the amount of wages up to the time of the action bars any further action.*

* See *Rosenmuller v. Lampe* (89 Ill. 212), 31 Am. Rep. 74, and note, 75.

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ACTION for breach of contract. The opinion states the case. The plaintiff had judgment at trial, reversed at General Term.

O. P. Jacobs, for appellant.

A. C. Harris, for appellee.

NIBLACK, J. Suit by George O. Richardson against the Eagle Machine Works.

The complaint stated that on the 1st day of February, 1876, the defendant employed the plaintiff as travelling salesman and agent for the term of one year, and agreed to pay him \$125 per month, or \$1,500 per annum ; that the plaintiff entered upon such employment and continued in the service of the defendant until the 31st day of October, 1876, at which time the defendant, without proper cause, discharged him from its service and refused to pay him his proper wages from and after that date ; that afterward, on the 20th day of December, 1876, the plaintiff having endeavored and failed to obtain employment elsewhere, brought an action against the defendant for the sum of \$192 for the unpaid balance of his salary up to the 31st day of October, 1876, and for the further sum of \$250 for wages due the plaintiff for the month of November and for a part of December, in the year 1876, the time which had elapsed after his discharge as above stated ; that in that action the defendant claimed that the plaintiff was not employed by the year, but that under the contract of employment it had the right to dismiss and discharge him at the end of any month, and that it did, in the exercise of that right, accordingly discharge him from its service on said 31st day of October, 1876 ; that the question as to the terms of said contract was properly put in issue by the pleadings in that action, and the jury which tried the cause found all the issues in favor of the plaintiff ; that the jury was so limited by the instructions of the court that they did not allow the plaintiff his salary later than the 20th day of December, 1876, the day on which that action was commenced ; that after the 20th day of December, 1876, and up to the 1st day of February, 1877, the plaintiff endeavored to obtain employment elsewhere but wholly failed, being compelled to remain idle during that entire period of time ; that he was ready and willing during all that time to serve the defendant under his

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said contract of employment, but the defendant refused to accept his services or to pay him for the time he was so compelled to remain idle by reason of its misconduct in discharging him from its service, for which he was entitled to compensation at the rate of \$125 per month; that the plaintiff expended the sum of \$50 in endeavoring to obtain employment elsewhere than with the defendant. Wherefore the plaintiff demanded damages in the sum of \$217, and general relief.

A demurrer to the complaint was overruled, and upon a trial at Special Term there was a verdict and judgment for the plaintiff. Upon an appeal to the General Term, the complaint was held to be insufficient and the judgment at Special Term reversed.

Error is assigned here upon the proceedings at General Term.

Considerable uncertainty existed at one time as to the proper remedy upon the breach of a simple contract for labor for a specified time, or in some specific undertaking. But we think it may be safely inferred from the recently decided cases, that where a servant has been wrongfully discharged before the conclusion of his term, he may, in addition to his right to recover for wages already earned, treat the contract of hiring as continuing on his part, and sue for damages for the breach by the master, or he may rescind the contract and recover the value of his services actually rendered.

It was formerly held, that where in such a case the servant treated the contract as continuing in force, he might recover what was denominated constructive wages for the remainder of his term; but what might then have been denominated constructive wages is now included under the general head of damages resulting from the master's breach of the contract of employment. *Ricks v. Yates*, 5 Ind. 115; *Moody v. Leverich*, 4 Daly, 401; *Grandell v. Pontigny*, 4 Camp. 374.

The amount sued for and recovered in the former action as wages for November and a part of December, 1876, was therefore in legal contemplation, damages, and not in any proper sense wages.

The plaintiff having brought and prosecuted to final judgment one action for the defendant's breach of the contract sued on in this case, his remedy for that breach is exhausted. A party is not permitted to split up his cause of action and bring two suits for the same breach of a contract, where as in this case, full damages might have been demanded and recovered in the first action. *Crosby v. Jeroloman*, 37 Ind. 264.

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The court below in General Term consequently committed no error in reversing the judgment at Special Term.

The judgment is affirmed, with costs.

Judgment affirmed.

Petition for rehearing overruled.

McFADIN v. DAVID.

(78 Ind. 445.)

Slander — actionability of words.

Words merely charging that the plaintiff administered morphine to another on the day he made his will, and that if it had not been for that, the plaintiff's daughters would not have got what they did, are not actionable *per se*, nor with an innuendo that the plaintiff had unlawfully administered poison causing death. (*See note, p. 590.*)

ACTION of slander. The opinion states the case. The plaintiff had judgment on demurrer below.

E. M. Spencer and W. Loudon, for appellant.

A. P. Hovey and G. V. Menzies, for appellee.

BEST, C. This was an action of slander, and the only question in the record arises upon the action of the court in overruling a demurrer to the second paragraph of the complaint.

In this paragraph it was alleged, "that heretofore, to wit, on the 17th day of July, 1879, one Noah McFadin, the father of the said defendant, was in his last sickness, and in a dying condition, and then and there made and executed his last will and testament, in which said last will and testament the said Noah McFadin bequeathed to the daughters of the plaintiff, Maggie David and Nancy David, the sum of \$500 each, and after the making of said will the said Noah McFadin departed this life intestate, leaving said will in full force, and afterward, to wit, on the 1st day of September, 1879, the said defendant spoke the following false and scandalous words of and concerning the said plaintiff, and of and concerning the said Noah McFadin, and the said last will and testament, that is to say: 'Old Lady' (the plaintiff meaning) 'you gave my father' (the said

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Noah McFadin meaning) 'four double doses of morphine on the day he made his will; you' (meaning the plaintiff) 'said, old man, you' (said Noah McFadin meaning) 'had better be fixing up your business. If it hadn't been for you' (the plaintiff meaning) 'giving morphine, your daughters' (the said Maggie and Nancy meaning) 'would not have gotten what they did.' Then and thereby meaning that the said plaintiff had unlawfully administered poison to the said Noah McFadin in his life-time, which caused his death, and left to the said daughters of the plaintiff \$500 each, for which plaintiff says she is damaged in the sum of \$2,000, for which she demands judgment."

The paragraph was insufficient, and the demurrer should have been sustained.

The words spoken were not actionable *per se*. They do not, in their usual sense, either import a charge of murder or of manslaughter. They do not amount to a charge that death ensued from the administration of the morphine, or that it was administered either improperly or feloniously. Indeed it does not appear that any harm resulted from its administration. It is true that it is stated by the innuendo that the defendant meant, by the language spoken, that the plaintiff had caused the death of Noah McFadin by the unlawful administration of poison, but an innuendo can not enlarge the meaning of words. If the words themselves do not warrant the signification imputed to them, an innuendo can not. Words not actionable *per se* can not be rendered so by an innuendo.

"The absence of a *colloquium*, showing by extrinsic matter that the words charged are actionable, is not supplied by an innuendo attributing to those words a meaning which renders them actionable." *Schurick v. Kullman*, 50 Ind. 336.

Treating the paragraph in question as unaided by the averment of extrinsic facts, the innuendo can not supply a meaning that the words themselves do not warrant. Taken in their usual and ordinary sense, they do not charge that the plaintiff caused the death of Noah McFadin by the administration of morphine or otherwise, and as they do not they are not actionable *per se*. Unless they constitute such charge, they impute no crime to the plaintiff.

In *Ford v. Primrose*, 5 D. & R. 287, the language was: "I think the present business ought to have the most rigid inquiry, for he (meaning the plaintiff) murdered his first wife, that is, he administered improperly medicines to her for a certain complaint, which

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was the cause of her death." Upon a motion in arrest of judgment, ABBOTT, C. J., said : " Admitting it to be doubtful whether these words import the charge of a crime upon the plaintiff, that doubt has been removed by the verdict ; for the declaration alleges that the defendant uttered these words with an intention to cause it to be believed that the plaintiff was guilty of murder or manslaughter, and if the jury were of opinion that they were uttered with that intention we can not say that the plaintiff is not entitled to a verdict. But I can not say that these words may not, in reasonable construction, import a charge of murder or manslaughter, especially after the finding of the jury." BAYLEY, J., said: " I take it that if a man, by the improper administration of medicines to another, cause his death, that would be manslaughter. And if he administers medicines with an intent to produce death, it would be murder. I think the words declared upon import at least a charge of manslaughter." The language of these judges was addressed to words not only charging the plaintiff with causing the death of his wife, but causing it by the improper administration of medicines. In this case the words neither charge that the morphine was improperly administered nor that its administration produced death. In *Jones v. Diver*, 22 Ind. 184, the words were these : " In my opinion the bitters that Diver fixed for Smith were the cause of his death," and it was averred that the words were used in a criminal sense, intending to charge Diver with the murder of Smith, which was understood by the hearers. The court said : " The words do not, in their usual sense, import a charge of murder ; and there is no colloquium showing that they were used in a conversation about Smith as having been murdered, etc., so as to give the words a particular signification as used in the given case." A charge that one person caused the death of another is not actionable *per se*. *Miller v. Buckdon*, 2 Bulst. 10 ; *Peake v. Oldham*, 1 Cowp. 275. In the light of these authorities we think it clear that the language declared upon is not actionable *per se*. The pleader did not, we think, regard the words actionable *per se*, as he alleged extrinsic circumstances to show their actionable quality ; and the question arises whether such facts render them slanderous. We do not think they do. The only facts averred are the amount of the legacies, the time when and the condition of the testator at the time he made his will. These add nothing to the complaint, as they do not show that the words were not used in their usual and ordinary sense, and therefore they do not render the words actionable.

The appellee however insists that the court, after verdict, will consider the words as used in their worst sense. This is the rule upon a motion for a new trial. *Blickenstaff v. Perrin*, 27 Ind. 527. And on a motion in arrest of judgment, or an assignment of error that the complaint does not state facts, many defective averments will be aided by a verdict, but not when the complaint is questioned by a demurrer. In such case a verdict can not aid a defective averment, nor supply a good cause of action.

Where the language is susceptible of an innocent and a criminal meaning, the court, after verdict for the plaintiff, upon a motion for a new trial, in arrest, or upon an assignment of error, will adopt the latter meaning, and where the language is rendered actionable by extrinsic circumstances defectively averred, the verdict will aid them, but language not actionable *per se*, in the absence of extrinsic circumstances, will not be so regarded, even after verdict.

The demurrer was improperly overruled, and for this error the judgment should be reversed.

Per Curiam.— It is therefore ordered upon the foregoing opinion that the judgment be, and it is hereby in all things reversed, at the appellee's costs, with instructions to sustain the demurrer to the second paragraph of the complaint, with leave to amend, etc.

NOTE BY THE REPORTER.— In *Schmidt v. Witherick*, Minnesota Supreme Court, May, 1882, the words were, "he swore falsely in the case with my brother," and the innuendo was "meaning in a certain action between defendant and his brother." *Held*, not actionable. The court, MITCHELL, J., observed: "To render words actionable *per se* they must impute a crime to the person of whom they are spoken, in such terms that without the aid of an innuendo, the nature of the offense charged is obvious. They must carry upon their face an open and direct imputation of a crime. The crime here attempted to be charged is perjury. Perjury is the willful giving under an oath or affirmation, legally imposed, of false testimony material to the issue or point of inquiry. The following elements are essential to constitute this crime: First, the oath must be false; second, it must have been legally imposed; third, the intention must have been willful. Now the words charged contain the first of these elements, and the innuendo supplies the second, but the third is lacking, unless the term 'falsely' implies and includes it. But these words 'swear falsely,' alone do not necessarily include the idea of willful intention. They may mean perfidiously or merely not truly. Swearing to that which is false, says KENT, C. J., does not necessarily imply that the party has, in judgment of law, perjured himself. It may mean that he has sworn to a falsehood without being conscious at the time, that it was false. Of course, to say that a man swore falsely may be intended to convey to the minds of the hearers the imputation of perjury, and when this is so, with the proper averments, they are actionable. This is all that is meant by some of the cases cited by respondent, in which it is said that these words are actionable. This is precisely what is said in *Morgan v. Livingston*, 2 Rich. 573. 'That in some of the cases cited they were considering a question of evidence and not of pleading is evident from the fact that the pleadings actually contained the usual innuendo, 'thereby meaning that the plaintiff had committed the crime of perjury'. This is so in *Rue v. Mitchell*, 2 Dall. 58, and *Fowle v. Robbins*, 12 Mass. 498. In other cases these words did not stand alone, but were coupled with other words, which included or implied the element of willful intention; as for example, where, after a charge of false swearing,

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the defendant added, 'I will attend to the grand jury about it,' or 'for which you stand indicted,' or 'done it meaning to cut my throat.' This was the ground upon which the words were held actionable *per se* in *Brace v. Brink*, 33 Mich. 91, cited by respondent. It seems to be the general doctrine that to say that a man swore falsely 'is not actionable *per se* unless coupled with some other words which imply, first, that he did so willfully; second, that he did so under oath legally imposed.' Upon the first of these the innuendo in this case does not aid the pleader, as it is but a repetition of the words charged."

But charging another with having sworn falsely and with having been indicted therefor is actionable *per se*. *Brace v. Brink*, 33 Mich. 91. The court said: "To charge another with having been indicted before the grand jury for false swearing is a direct charge that he has been judicially accused of having committed the crime of perjury, and has been indicted therefor. When a person is indicted by the grand jury, it is generally considered to be for some supposed criminal offense. And when charged with having sworn false, and with being indicted for false swearing, it is a direct charge that the person has sworn falsely in reference to some material matter in a court of competent jurisdiction, and has thereby committed the crime of perjury, for which he has been indicted. The charge of being indicted therefor clearly and sufficiently indicates the nature and place of the false swearing charged. To charge another with swearing falsely might not be sufficient standing alone, but when coupled therewith the charge is also made that the person has been indicted therefor, this characterizes the other part of the charge, and raises it to that grade which makes it a criminal and indictable offense. Otherwise we can attach no meaning to the fact of the party's having been indicted therefor. See *Crone v. Angell*, 14 Mich. 340; *Jacobs v. Fyler*, 3 Hill, 572; *Roberts v. Camden*, 9 East, 98; *Pelton v. Ward*, 3 Cal. 73 (3 Am. Dec. 251); *Gilman v. Lowell*, 8 Wend. 573 (24 Am. Dec. 96)." *Roberts v. Camden*, *Pelton v. Ward*, and *Gilman v. Lowell*, support this ruling.

In *Jacobs v. Fyler*, 3 Hill, 572, the charge was "he has sworn false to my injury six or seven hundred dollars." Held, actionable. COWEN, J., said: "As a general rule, it is intended that what a witness has sworn to is material, and when he is charged with having sworn falsely in a judicial proceeding, the charge imports perjury. If the defendant mean to escape on the ground that the plaintiff's testimony was in truth immaterial, and so not perjury, he must show that fact on his part. Indeed, he must go much further. He must prove that the slanderous words themselves were so qualified as to come short of imputing the crime of perjury. The injury consists in the fact that the defendant ostensibly charged the plaintiff with perjury. The hearer can know nothing of what actually passed in court to qualify the real nature of the falsehood imputed. Of what possible effect, by way of exculpation or mitigation can it be, after telling the plaintiff's neighbors that he had been guilty of a crime, to go further and show that he was innocent? The proposition comes to that. The plaintiff is sworn as a witness. The defendant says he swore falsely. No hearer can presume that he had been telling an idle story having no connection with the cause, for no court would listen to such a story; and therefore the charge must be interpreted as one of perjury." "No one would understand this to be extrajudicial swearing, or telling a *white lie*. The words themselves import perjury." This dwells on the materiality and not on the malice.

In *Spooner v. Keeler*, 51 N. Y. 527, the words charged false swearing, but the innuendo averred that the defendant thereby meant to charge perjury. This was held sufficient. To this effect is *Crookshank v. Gray*, 20 Johns. 344; *McClaghry v. Wetmore*, 6 id. 82 (5 Am. Dec. 194.)

In *Sherwood v. Chace*, 11 Wend. 38, the words were, "I cannot enjoy myself in a meeting with Sherwood, for he has sworn false, and I can prove it, and if you do not believe it you can go to Esquire Bassett's and see it in a suit between," etc.; and the allegation was that the defendant contrived "to cause it to be suspected that he had been guilty of perjury." The court said: "And where the defendant alleged that the plaintiff swore false — so false that he could not enjoy himself in a religious meeting with him — he negatives the idea that the oath was false by mistake; of course it was willful and corrupt — in other words, perjury." "A charge of false swearing is actionable when it necessarily conveys to the mind of the hearers an imputation of perjury, otherwise it is not." So "you have sworn to a lie and I can prove it" (*Hopkins v. Beedle*, 1 Cal. 347; 2 Am. Dec. 191), or "he swore false before 'Squire Andrews, and I can prove it" (*Stafford v. Green*, 1 Johns. 505), or "he

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has taken a false oath in 'Squire Jamison's court (*Ward v. Clark*, 2 Johns. 10 ; 3 Am. Dec. 883), is not actionable. But "what he has sworn to is a damned lie" (in a discourse about a certain trial) is actionable (*Nivin v. Muun*, 13 Johns. 48; *Chapman v. Smith*, id. 77); but this was after verdict. "After verdict we must conclude that the malice was proved."

In *Cinns v. Robinson*, 3 Barb. 625, the words, "he has sworn to a lie, and done it meaningly to cut my throat," were held actionable; so in *Kern v. Tirrelly*, 51 id. 385, where the words were "Any man who professed to be a Christian as you do, and went into the box and swore false as you did at that trial, had better join the church once more."

In *Power v. Price*, 16 Wend. 450, the defendant had told the plaintiff that he had sworn false on a certain trial, in swearing that he did not recollect a certain fact, "when in truth he did recollect it." This of course imported intentional perjury, but the chancellor remarks, upon the point of presumption of materiality, that it was incumbent on defendant to prove the immateriality, "and that he did not intend to impute perjury to the plaintiff;" and that it would be presumed, in the absence of proof of materiality "that he intended to impute perjury to the witness;" and quoting from Mr. Justice Ashurst, in *Coleman v. Godwin*, 3 Doug. 91, that "if a party charges a witness with having sworn false in respect to a particular fact in a cause, which fact would not necessarily be immaterial and irrelevant, the natural effect of the words spoken is to convey to those who hear them the impression that the witness has committed perjury; and if the defendant wishes to show that he did not intend to impute the crime of perjury to the plaintiff, but merely that he has perverted the truth in relation to an immaterial fact, as to which his oath did not bind him to tell the truth, the burden of showing that the fact testified to was not material to the issue, and that it was not intended to impute to the plaintiff false swearing in the suit, in the ordinary sense and meaning of the term, rests upon the defendant."

In *Morgan v. Livingston*, 2 Rich. 573, the words "you swore a lie," were not only charged as having been spoken in reference to a certain suit, but as having been uttered in connection with certain other words clearly importing larceny, as "you stole a beef," etc. The case does not show whether the declaration contained an averment or innuendo of intent to charge perjury, but it is clear that the words meant that.

"You are forsworn," is insufficient; *Stanhope v. Blith*, 4 Rep. 15; *Holt v. Scholfield*, 6 T. R. 691; *Hall v. Wendon*, 8 D. & R. 140; but "you are forsworn in a court of record" is sufficient; *Ceely v. Hoskins*, Cro. Car. 509. "Forsworn" meaning "perjured." So a charge of having sworn "through thick and thin" does not import perjury; *Reg. v. Marshall*, 2 Jur. 254. But where the defendant exclaimed during the examination of a witness, "it's not so; no such thing," the jury finding them intended to impute perjury, the court held them actionable; *Dedway v. Powell*, 4 Bush, 77. So, "that's a lie" (*Mower v. Watson*, 11 Vt. 536); or "I believe you swear false: it is false what you say" (*Cole v. Grant*, 18 N. J. 827); or "you have sworn a manifest lie" (*Kean v. McLaughlin*, 2 S. & R. 469; *McLaughry v. Wetmore*, 6 Johns. 82), is actionable. But in *Badgley v. Hedges*, 1 Pennington, 33, the words "that is a lie, and I can prove it," and a little after, "and I think I have proved it," held, not actionable. The court said: "That the language was uncivil and merited the censure of the justice before whom the testimony was given, is very clear; but it is not actionable; nothing is more common than for a party to say in his defense that the evidence given against him is not true, and that he can prove it."

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HAMILTON v. HUNTLEY.

(78 Ind. 581.)

Fixtures — mortgages.

Manufacturers of machinery allowed the tenant of a mill to put it in on trial. It was put in in such a manner as to be capable of removal without injury to the mill. The tenant refused to accept it, and left the premises without removing it. *Held*, that it became a fixture as to a prior mortgagee of the mill.

THE opinion states the case.

T. B. Adams and L. T. Michener, for appellants.

E. P. Ferris, A. F. Wray and H. H. Daugherty, for appellees.

BICKNELL, C. C. Peyton Johnson and wife, in February, 1877, mortgaged land, including a mill and its appurtenances, to Kennedy and Robertson, to secure several notes payable to them, and made by Peyton Johnson. These notes became the property of the appellant Hamilton, by indorsement.

The same grantors, in February, 1878, mortgaged the same land to the appellant Hamilton, to secure a note payable to him and made by Peyton Johnson.

Hamilton brought suit upon the notes and mortgages and obtained a judgment of foreclosure against Johnson and wife.

Thereupon the appellees Huntley, Holcomb and Heine, were made defendants, and they filed a cross complaint against Hamilton Johnson and wife, and Kennedy, alleging that after the execution of said notes and mortgages, and before suit was brought thereon, they delivered to Peyton Johnson a middling purifier, and a bran duster, and a brush machine, to be put by him in said mill and used on trial, and if found satisfactory, then within sixty days after such delivery Peyton should notify them of his acceptance of the machines and give them his notes therefor, and then the said machines should become his property; that said machines are fastened to the floor of the mill temporarily by cleats and nails, and can be removed without injury to the building or freehold; that they were not attached to the building or the realty in any permanent manner by or with the knowledge or consent of the

cross complainants, but were only temporarily attached by said Peyton for the purpose of testing their value, and that their removal will not render the freehold and mill less valuable than when the mortgages were given; that said Peyton, although said sixty days long ago expired, and although often requested, has failed and refused and still refuses to accept said machines and execute said notes, and the machines belong to said cross complainants; that said mill property is now in possession of said Kennedy, as tenant of said Minerva Johnson, its owner, and said Kennedy, on demand, has refused to deliver said machines to said cross complainants.

The prayer of the cross complaint is, that the said machines be excepted from the decree of foreclosure and declared to be the property of the cross complainants, and that said Hamilton and the Johnsons and Kennedy be enjoined from claiming any right to the machines, or the use thereof, and for all other proper relief.

Hamilton filed a demurrer to this cross complaint, and the same was overruled.

The said Hamilton, Minerva Johnson and Kennedy answered the cross complaint jointly, alleging that the said land and mill belonged to said Minerva in fee simple; that the mill is a three-story brick building, on stone foundations eight feet deep, with a steam engine and boiler in a brick and stone bed, and permanently attached to the building and machinery; that the machinery is fastened to the building permanently by rods, bolts, pulleys, bands, screws and other fastenings; that the same was not placed in said mill for trade, but to be used and enjoyed permanently as a part of said real estate; that said Peyton held said property as tenant of said Minerva, from February 10, 1877, to February 1, 1879; that during his tenancy, he, without the knowledge or consent of the respondents, procured the said machines, fastened them to the floor by cleats and nails, and to the ceiling and joists by nails and braces, and connected them with the other machinery of the mill by belts, pulleys, elevators, chutes and large screws; that said machines were thus attached to the mill by said tenant, during his tenancy, and without the consent of the respondents, and were continuously used by him until the end of his tenancy, and were then delivered up with the mill to the said Minerva Johnson, who rented said property to said Kennedy, who now holds the same as such tenant, and is in daily use of said machines, without which the mill cannot be properly used; that these respondents had no

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notice of the claim of the cross complainants. The answer then alleges the execution of the notes and mortgages mentioned in the original complaint, and that at the time of the execution of said second mortgage, said Hamilton had no notice of the cross complainants' claim upon said machines; that said machines were attached to the mill when the said notes of Robertson and Kennedy were assigned to said Hamilton, who then had no notice of said cross complainants' claim.

The cross complainants filed a demurrer to this answer; said demurrer was sustained, and the respondents declining to answer further, judgment was rendered against them upon the cross complaint, that the said machines were the property of said Huntley, Holcomb and Heine, and were not covered by said mortgages or by the said decree of foreclosure.

From this judgment the said Hamilton, Kennedy and Peyton Johnson appealed; the said Minerva Johnson refused to join in the appeal; her name is stricken from the record.

The appellants assign errors:

1. Overruling the demurrer to the cross complaint.
2. Sustaining the demurrer to the answer to the cross complaint.

Personal property may be annexed to the freehold so as to become a part of it, although the annexation be made by mistake merely. *Seymour v. Watson*, 5 Blackf. 555. Or by a wrongful act. *Ricketts v. Dorrel*, 55 Ind. 470. And without permanent insertion, the annexation, apparently, resulting more from the intention of the party and the nature and uses of the property than from the mode of uniting, and the property becoming part of the realty, although capable of easy removal without substantial injury to the freehold. And there are constructive fixtures, which in ordinary understanding make part of the land or building; such are rails on a fence, stones in a wall, and Venetian blinds and locks and keys of a house. 2 Kent Com. 347, note a.

At common law, ordinarily, subject to some exceptions, as between landlord and tenant, in favor of trade, whatever is annexed to the freehold becomes part of it, and cannot afterward be removed, except by him who is entitled to the inheritance. *Van Ness v. Pacard*, 2 Pet. 137, 142.

In the United States, the modern cases exhibit a conflict of opinion as to fixtures.

In Connecticut, it was held that a simple annexation to the realty

is not sufficient, and that to become a fixture, the chattel must be so annexed that an injury to the freehold will result from the mere act of removal, independently of the subsequent want of the thing removed. *Swift v. Thompson*, 9 Conn. 63 (21 Am. Dec. 718). In Maine it was held that where machinery is essential to the purposes for which a building is employed, it must be considered as a fixture, although only attached to other machinery, and not to the premises themselves, and capable of being removed without immediate or physical injury of any sort. *Farrar v. Stackpole*, 6 Greenl. 154. To the same effect are the Pennsylvania cases. *Voorhis v. Freeman*, 2 W. & S. 116; *Pyle v. Pennock*, id. 390. But in New York it was held, that in order to constitute a fixture, adaptation to the enjoyment of the realty and annexation thereto must concur, although where the former exists the slightest fastening will be sufficient to constitute the latter. *Walker v. Sherman*, 20 Wend. 636.

In Indiana, the New York opinion seems to prevail, and there is no conflict in the cases.

In *Taffe v. Warnick*, 3 Blackf. 111 (23 Am. Dec. 383), it was held that a carding machine in a carding house, standing on the floor in its usual place of operation, but not fastened at all to the building, was not a fixture. In *Sparks v. State Bank*, 7 Blackf. 469, it was held that a steam engine in a tanyard, for the purpose of tanning, which could be removed without injury to the building, being connected therewith by braces, was a fixture, and passed to the mortgagee of the land where it stood. It was held in this case that the exceptions as to a tenant in favor of trade were not applicable; that the rule as between heir and executor, vendor and vendee, and mortgagor and mortgagee, is the same, and that in such cases such fixtures pass with the land, though erected for the purposes of trade. In *Taffe v. Warnick*, *supra*, it was held, that as between debtor and creditor, the same rule applies as between landlord and tenant. In *Millikin v. Armstrong*, 17 Ind. 456, it was held that personal property, used in and attached to a starch factory, will pass by a mortgage of the freehold. In *Bowen v. Wood*, 35 Ind. 268, the court went a step further, and held that machinery put in a mill after the execution of a mortgage, to supply the place of old and worn out articles, becomes a part of the realty, and is subject to the mortgage. In *Pea v. Pea*, 35 Ind. 387, it was held that a steam saw-mill and machinery pass by a conveyance of the land on which the mill stands; and a like ruling was made in *Kennard v. Brough*,

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64 Ind. 23, as to a sorghum mill. In *Cromie v. Hoover*, 40 Ind. 49, it was held, that buildings erected on leased land by a tenant, for the better use and enjoyment of the property, may be removed by him before the expiration of his lease, provided that can be done without permanent injury to the freehold. To the same effect are *Allen v. Kennedy*, 40 Ind. 142, and *McCracken v. Hall*, 7 Ind. 30. It is also held in Indiana, that the question, whether chattels annexed to real estate, become part of it, may be determined by the contract of the parties. Thus, in *Frederick v. Devol*, 15 Ind. 357, where A. held a mortgage on real estate and a machine-shop, and B. held a subsequent mortgage on the patterns, tools and movable fixtures in said shop, and the second mortgagee claimed said tools, etc., and the first mortgagee pleaded his prior mortgage, and the reply averred an agreement between the mortgagor and the first mortgagee that the tools, patterns, etc., should not be included in said first mortgage, it was held that the reply was good. And in *Yater v. Mullen*, 24 Ind. 277, where A. built a mill on B.'s land, under a contract that if B. would pay off a judgment and convey to A. half of the land, then B. should own half of the mill, and that until then the mill should remain the property of A., it was held, that after the sale of the land on an execution against B. the mill was A.'s personal property, and that he might remove it. So in the case of *Pea v. Pea*, *supra*, it was held that the legal effect of a deed might be controlled as to fixtures by the parol agreement of the parties, at the time of making the deed. And in *Taylor v. Watkins*, 62 Ind. 511, it was held that where there was a mortgage of land, on which was a steam saw-mill, boiler and engine, a complaint against the mortgagee, alleging that the mortgage did not include and was not to include said mill, etc., was sufficient to put the mortgagee upon his defense, and was good on demurrer. And in *Griffin v. Ransdell*, 71 Ind. 440, it was held, that although a dwelling-house is ordinarily part of the land on which it stands, yet a valid contract may be shown, between the owner of the land and the claimant of the house, by which the presumption that the dwelling-house is real property may be rebutted. It has also been held in Indiana, that where the owner of fixtures has a right to remove them, they are liable to be taken on execution and sold as his property. *State, ex rel., v. Bonham*, 18 Ind. 231.

It appears from the cross complaint that the real owner of the mortgaged property, in the case at bar, was Minerva Johnson, and

that Peyton Johnson, at the time the machinery in controversy was annexed to the mill, "was in possession of said mill and using and running the same," and that said machinery was annexed to the mill by said Peyton Johnson after the execution of the mortgages. There is no averment that Minerva Johnson, the owner of the land, or Hamilton, the mortgagee, had notice of the alleged agreement between the cross complainants and Peyton Johnson in reference to the machinery. It is not stated whether Peyton Johnson's possession of the mill was rightful or wrongful, nor whether he was in as tenant or otherwise.

Upon such a showing, it follows from the cases hereinbefore cited that the machinery was subject to the mortgage.

If Peyton Johnson was a tenant, the rule, as we have seen, is that a tenant may remove such machinery during his term, but not afterward; but the cross complaint shows that the cross complainants permitted the machinery to remain in the mill long after the sixty days allowed for trial had expired, and long after Johnson's possession had ended, and after the premises had been rented by Kennedy, and the mill and machinery delivered up to him.

The alleged contract between the cross complainants and Peyton Johnson did not bind Hamilton, the mortgagee. The cases hereinbefore cited, which hold that the legal rule as to fixtures may be modified by the contract of the parties, apply only when the contract is made by the party who, without such contract, would be entitled to the personal property as part of the real estate. There was no cause of action in the cross complaint, and the court erred in overruling the demurrer to it.

As to the answer to the cross complaint, it need not be specially considered, because a bad answer is good enough for a bad complaint. *Ætna Ins. Co. v. Baker*, 71 Ind. 102. But it shows that Peyton Johnson was only a tenant; that he annexed the machinery without the knowledge or consent of the defendants; that at the end of his tenancy he delivered up the mortgaged premises with said machinery permanently annexed thereto, and that defendants had no notice of the cross complainants' claim; that said machinery had already been so annexed at the time when Hamilton took the assignment of the notes secured by the first mortgage, and remained so annexed at the date of the execution of the second mortgage; and that Hamilton took both notes and mortgage, without any notice of said alleged contract with Peyton Johnson. The answer

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shows still more conclusively than the cross complaint, that the machinery is subject to the mortgage. The court erred in overruling the demurrer to the cross complaint and in sustaining the demurrer to the answer to the cross complaint, and the judgment of the court below upon the cross complaint ought to be reversed, with instructions to sustain the demurrer to the cross complaint.

Per Curiam.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below upon said cross complaint be, and the same is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court below to sustain the demurrer to the cross complaint.

Judgment reversed.

WOODS, J. dissents.

STATE V. DOE.

(79 Ind. 9.)

Criminal law — larceny — dogs — “personal goods.”

Dogs are not subject of larceny at common law, nor under the statute of larceny as “personal goods,” they not being taxed and their owners being required to register and tag them.*

INDICTMENT for stealing dogs. The indictment was quashed below. The opinion states the case.

D. P. Baldwin, attorney-general, *C. W. Watkins*, prosecuting attorney, and *M. L. Spencer*, for State.

B. F. Ibach and *B. M. Cobb*, for appellee.

WORDEN, J. An indictment was found against the appellee in the court below charging that the defendant, “on the 12th day of October, 1881, at,” etc., “did then and there unlawfully and feloniously steal, take and lead away two dogs, of the value of \$50, of the goods and chattels of George Stultz, contrary,” etc.

On motion of the defendant the indictment was quashed and the

* See *State v. Brown* (9 Baxt. 53), 40 Am. Rep. 81.

State excepted. The State brings the case here for a review of the decision below.

It is claimed by the appellee that dogs are not the subject of felonious larceny and therefore that the indictment was properly quashed. This position is controverted on the part of the State.

At common law a dog was not the subject of larceny. A few references to elementary books may not be out of place.

In 1 Hale's Pleas of the Crown (1st Am. ed.), 512, it is said that "Larceny can not be committed in some things whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass in respect to the baseness of their nature, as mastiffs, spaniels, gray-hounds, blood-hounds or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, etc., or their whelps, or calves, because though reclaimed they serve not as food but pleasure, and so differ from pheasants, swans, etc., made tame, which though wild by nature serve for food."

Blackstone says: "As to those animals which do not serve for food and which therefore the law holds to have no intrinsic value, as dogs of all sorts and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny." 4 Bl. Com. 236.

Bishop says: "Of those of which there can be no larceny though reclaimed, are mentioned dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing-birds, martins and coons. Though animals of the latter class may, when reclaimed, have a recognized value, and the right of property in them be protected in civil jurisprudence, it is otherwise in criminal, on the ground, probably, that anciently they were deemed of no determinate worth, and thus was established a rule which the courts could not afterwards change." 2 Bish. Crim. Law, § 773.

There may be a property in dogs that will be protected by law. They may be valuable. Many noble animals of the species doubtless are, and so we may suppose are the whole host of "mongrel whelps of low degree," in the estimation of their owners. But this is not decisive of the question involved.

We have seen by the common-law authorities that while dogs may have a value, and the owners may have a property in them

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which the law will protect, still they are not the subject of larceny. They are the subject of malicious trespass. *Kinsman v. State*, 77 Ind. 132. This however does not settle the question. It does not follow that because a dog is the subject of malicious trespass, he is the subject of larceny. In *Parker v. Wise*, 27 Ala. 480, it was held that an action would lie for wrongfully shooting the plaintiff's dog; yet in the later case of *Ward v. State*, 48 Ala. 161; s. c., 17 Am. Rep. 31, while the correctness of the former decision was recognized, it was held on common-law grounds that larceny could not be committed of a dog.

In 2 Whart. Crim. Law, § 1755, it is said that "as to all other animals which do not serve for food, such as dogs and ferrets, though tame and salable, or other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law. It is otherwise however when they are taxed." Reference is made to the case of *People v. Maloney*, 1 Park. 593. See also *People v. Campbell*, 4 id. 386.

If dogs were taxed in Indiana as other property for revenue purposes, it would be a strong circumstance to show an intent on the part of the legislature to abrogate the common-law rule and make them the subjects of larceny like any other personal property. But so far as we are advised dogs have never been thus taxed.

A specific tax has been from time to time levied upon dogs, and when collected applied generally if not always, to payment for sheep killed by them. See the statutes cited in the case of *Kinsman v. State*, *supra*. See also as to dog fund, section 2651, R. S. 1881. This discrimination in the mode of taxing dogs shows that the legislature did not intend to place them in all respects upon the footing of other personal property. The tax is levied *per capita* on the dogs and not *ad valorem*. Dogs are not by these statutes recognized as subjects of general taxation for revenue purposes and taxed accordingly. The object of the tax has been the non-production of dogs rather than the production of revenue. Taxation for revenue must be uniform, based upon a just valuation of the property taxed. Constitution, art. 10, § 1.

These specific taxes upon dogs can be upheld only on the ground that they are not revenue measures but police regulations. *Bright v. McCullough*, 27 Ind. 223; *Mitchell v. Williams*, id. 62; *State v. Cornnall*, id. 120; *Haller v. Sheridan*, id. 494. In *Mitchell v. Williams*, *supra*, the court said: "That as a measure of internal police

the legislature has the power to encourage the rearing of sheep, and with that object in view to discourage the keeping of dogs, animals which are not even the subject of larceny at common law, can not be doubted." So far therefore as any inference can be drawn from the taxation of dogs, considering the character and purpose of the taxation, it is rather against than in favor of the theory that the legislature intended to abrogate the common-law principle and make them the subject of larceny.

This brings us to considerations bearing more directly upon the question involved.

By section 1933, R. S. 1881, which took effect September 19, 1881, it is made grand larceny to steal, etc., "the personal goods of another" of the value of twenty-five dollars or upward, and the punishment is imprisonment in the State prison from one to fourteen years, fine and disfranchisement.

By section 1934 it is made petit larceny to steal, etc., "the personal goods of another" of the value of less than twenty-five dollars; and the punishment is imprisonment in the State prison from one to three years, fine and disfranchisement; or imprisonment in the county jail not more than a year, fine and disfranchisement.

These offenses are both denominated felonies. § 1573.

Now in some sense and for some purposes, dogs may doubtless be regarded as "personal goods." But the question is, did the legislature intend by the use of those words in defining grand and petit larceny, to include dogs? We are not left solely to the common-law principle, that dogs are not the subject of larceny, for an answer to this question. That principle together with concurrent legislation settles it conclusively.

By section 2647 of the same statutory revision it is provided that any person who shall own or harbor any animal of the dog kind shall on or before the first of April 1882, and yearly thereafter, report to the proper township trustee the number of dogs owned or harbored by him which exceed the age of six months; the trustee is to register and number the same with a brief description of each dog, by sex, color and breed, and furnish the owner with a metallic tag with number and year to correspond with register, which tag the owner is to attach to the neck of the dog by a collar; the owner is to pay one dollar for a male dog, two dollars for a female, and if more than one dog is kept, two dollars for each additional dog.

By section 2648 it is made unlawful for any dog to run at large

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without collar and tag as provided for, and it is made lawful for any person to kill the same.

By section 2649 it is made the duty of the constables to "proceed to kill all dogs on and after the first day of April, 1882, which shall be found at any time thereafter without collar and tag as herein provided." The section contains also the following provision: "Any person who shall maliciously injure or kill, or any person who shall steal, take and carry away any dog which has been duly registered and is wearing a metallic tag according to the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction be fined in a sum not exceeding \$200, to which may be added imprisonment in the county jail for any term not exceeding thirty days."

It is thus seen that unregistered and untagged dogs are placed under the ban of outlawry. Every man may slay them when running at large and it is made the duty of constables to do so when found.

It is made a misdemeanor to maliciously injure or kill or to steal a registered and tagged dog.

In view of the common-law principle and this legislation it is impossible to suppose that the legislature intended by the words "personal goods," in defining grand and petit larceny to include dogs.

The fact that the time has not yet come when dogs are required to be registered is of no importance to the question here involved. The intention of the legislature in the several enactments is unmistakable.

The indictment was properly quashed.

The judgment below is affirmed.

Judgment affirmed.

WILLIAMS V. STOLL.

(79 Ind. 80.)

Negotiable instrument — negligence in executing.

One who, being unable to read or write English, signs and delivers a promissory note in English, fraudulently represented to him to be a different paper, is liable thereon to an innocent purchaser, if he fails to require one of his sons, present at the time and able to read English, to read the instrument to him before signing. (*See note, p. 607.*)

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

D. H. Stapp and J. A. Parks, for appellants.

MORRIS, C. The appellants, as assignees, brought this suit against the appellee, on the following note :

“ June 26, 1878.

“ Three months after date, I promise to pay to the order of George Stoll, \$192 at the First National Bank, Lawrenceburg, Indiana, value received, with interest at ten per cent, per annum, without any relief from valuation or appraisement laws. And I promise to pay all attorney's fees and cost and charges for the collection of this note. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note. The makers and indorsers of this note further expressly agree that the payee or his assigns may extend the time of payment thereof, from time to time, indefinitely as he or they may see fit, and receive interest in advance or otherwise, from either the makers or indorsers, for any extension so made. GEORGE STOLL.”

The note was alleged to have been indorsed by George Stoll to W. P. McCay, and by him indorsed, before due and for a valuable consideration, to the appellants, who aver that they are innocent holders of the note.

The appellee answered the complaint by a general denial, and he also answered it by a special paragraph, in which he alleged that he was a German by birth, who came to this country when forty-eight years of age ; that he was, at the time the note is alleged to have been given, sixty-eight years old ; that he could neither read nor write the English language, and spoke it very imperfectly ;

that on the 26th day of June, 1878, two strange men, whom he had never seen before, came to his house, in Logan township, in Dearborn county, one having red hair and the other having dark hair ; that he did not know their names ; that when the strangers came, he and his two sons were at work in the field ; that they went to the house together ; and that the red-haired man said they wanted to appoint an agent in that neighborhood to sell family medicines, prepared by the " Western Medical Works," at Indianapolis, and that they wished to appoint him to act as agent, and put up posters and sell the medicines. He told the strangers that he could not act as agent ; that he was old, and could not read nor write. The red-haired man then proposed that the appellee's son, Martin, should act as agent, and asked Martin how old he was, and was informed that he was a minor ; that he then proposed that said Martin should act as agent for the sale of said medicines in the neighborhood ; that they would give him a dollar and a half per day for his time spent in putting up posters to advertise the medicines, and a commission of twenty-five per cent, on sales made by him, but as Martin was a minor, his father, the appellee, must sign the agreement for him to act as such agent ; that the red-haired stranger stated to the appellee that if he accepted such agency for his son, he would not be required to pay any money unless his son, as such agent, made sales of said medicines, and that if sales were made, he would only have to pay over the proceeds, less commissions and expenses, once in every three months to the First National Bank in Lawrenceburg ; that if no sales were made there would be nothing to pay ; that the stranger who made these statements got the appellee's son, Martin, to go with the other stranger to the barn, under pretense of watering the horses, and then drew up the papers, and stated to the appellee that the papers were simply to show that his son had accepted said agency, and that he was duly appointed agent of said company for the sale of said medicines, and that the money arising from such sales, after deducting commissions and expenses, should be paid into the First National Bank of Lawrenceburg, at the end of every three months ; that said papers did not require the appellee to pay any money, unless sales should be made ; that thereupon, and upon such representations, he consented that Martin should act as such proposed agent ; that he then signed two or three papers presented to him by said stranger ; that if any of them was the note in suit he did not know it ; that he signed said papers with

the understanding that they related to said agency, and nothing else ; that nothing was said at any time about a note, and that he would not have knowingly signed a note ; that the strangers then left, and that he has not seen them since ; that neither he nor his son ever received any of the medicines for sale ; that if his name is to the note, it was procured without his knowledge or consent, and by the false and fraudulent representations of the strangers.

Upon these facts the appellee demands judgment. Both paragraphs of the answer were verified.

The same facts stated in the special paragraph of the answer were set up by way of counter-claim, except that in the counter-claim the sons of the appellee are not stated to have been present at the time of the transaction. The counter-claim is verified.

The appellants demurred to the special paragraph of the answer and to the counter-claim. The court overruled the demurrers and the appellants excepted. The cause was tried by a jury ; verdict and judgment for the appellee.

The rulings of the court upon the demurrers are assigned as errors.

The note sued on is commercial paper, and is governed by the law merchant. The appellants are alleged in the complaint to be innocent holders, for value. The note was, in their hands, free from equities which the maker might have insisted upon as against any party having notice of such equities. It is very probable that the appellee was misled and imposed upon by the strangers to whom he delivered the note, but if by his negligence or careless indifference to his own interests he contributed to the imposition, or if by the exercise of a prudent diligence and regard for his own rights he might have protected himself, he should suffer rather than the innocent holder of his paper, carelessly issued by him.

It is not alleged in the special paragraph of the answer, that the sons of the appellee could not read and write the English language. The fair inference from the facts-stated is, that Martin could do so. The appellee refused to accept the agency himself, mainly upon the ground that he could not read and write. He directed Martin to accept it, agreeing to sign the necessary papers, for the reason, we infer, that he could both read and write. It is stated, apparently by way of excuse, that one of the strangers had under pretense of watering the horses induced Martin to go with him to the barn, and that he was not, for this reason, actually present when the

papers were executed. But if at the barn, he was not so far away that he could not have been called. The men with whom the appellee was transacting the business were entire strangers to him; he knew nothing of them. He knew that he could not read. Common prudence would have suggested to the appellee, under the circumstances, the propriety of calling in his son and having him read the papers presented to him for execution. But this he did not do. Without asking the stranger even to read them, he blindly relied upon his statement as to their contents and meaning, and as is not unfrequently the case, was deceived and imposed upon. He, and not the innocent holder of the note, must bear the consequence of his misplaced confidence. *Maxwell v. Morehart*, 66 Ind. 301; *Indiana Nat. Bank v. Weckerly*, 67 id. 345.

We think the court below erred in overruling the demurrer to the first paragraph of the answer. As the counter-claim is substantially the same as the special paragraph of the answer, the demurrer to it should have been sustained.

Per Curiam.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

Judgment accordingly.

NOTE BY THE REPORTER.—In *Mackey v. Peterson*, Minnesota Supreme Court, July 17, 1882, the defendant signed a negotiable promissory note, supposing it to be a receipt for a plow. The payee's agent, a stranger, who presented it to him, told him it was a receipt, and at his request assumed to read it to him, and read it as such receipt merely. There was no one else within half a mile who could read English. Relying on the representation and reading he signed and delivered the paper. *Held*, that he was liable to a *bona fide* transferee. The court said: "Where a party, through neglect of precautions within his power, affixes his name to that kind of paper without knowing its character, the consequent loss ought not to be shifted from him to a *bona fide* purchaser of the paper. Tested by this rule, the facts which defendant offered to prove would have been no defense. He signed the paper voluntarily. He was under no controlling necessity to sign without taking such time as might be needed to inform himself of its character. If he could not read it himself, there was no reason, except perhaps his own convenience or haste, why he should not postpone signing until he could have it read by some person upon whom he had a right to rely. Instead of doing that, he chose to rely upon an entire stranger, and that stranger the party opposed to him in interest, and the only person under any temptation to deceive him as to the character of the paper he was asked to sign. One who without any necessity so misplaced his confidence ought not to be heard to claim that the paper he is in consequence misled to sign should be taken out of the rule protecting commercial paper."

The question, what amounts to negligence in such cases, has not been considered in many reported cases. Of course, if the signer can read, but depending on the representations neglects to read, he is bound although he signs what he did not intend. *Putnam v. Sullivan*, 4 Mass. 45 (3 Am. Dec. 206); *Foster v. McKinnon*, L. R., 4 C. P. 704; *Douglas v. Matting*, 29 Iowa, 498; s. c., 4 Am. Rep. 238; *Shirts v. Overjohn*, 60 Mo. 305; *Am. Ins. Co. v. McWhorter*, 78 Ind. 186; *Chapman v. Rose*, 56 N. Y. 137; s. c., 15 Am. Rep. 401; *Neheker v. Cutsinger*, 48 Ind. 436.

But if the signer is unable to read, what diligence and care must he exercise to warrant

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him in signing? He must of course demand to have the paper read to him. "If a person who can read will not read a deed put before him for execution, or if being unable to read will not demand to have it read or explained to him, he is guilty of supine negligence, which I take it is not the subject of protection either in equity or in law." *Penn. R. Co. v. Shay*, 82 Penn. St. 202. To same effect, *Fisher v. Von Behren*, 70 Ind. 19; s. c., 36 Am. Rep. 162. But how far is he to go in his demand to have the paper read?

If the means are at hand, he must use them. Thus in *Citizens' Nat. Bk. v. Smith*, 55 N. H. 593, the defendant was an old man, of limited education and poor eyesight, and not in the habit of writing except to sign his name. His daughter, an intelligent woman, was present when the note was signed, and had an opportunity to read it, but was not called on by the defendant to do so, and did not do so. The court held the defendant bound by reason of his negligence.

In *Taylor v. Atcham*, 54 Ill. 196; s. c., 5 Am. Rep. 118, the signer could not read, except with great difficulty, and he asked the payee's agent to read it to him, and he misread it. The signer was held not liable to a *bona fide* transferee. The court said: "If he is unable to read, or does so with difficulty, then he may avail himself of the usual means of information, by having it read by some person present. * * * While this may not be the precaution which would have been observed by an unusually cautious man, still we think he acted as the great mass of men not in or educated to business act in such cases."

In *Gibbs v. Linabury*, 22 Mich. 479; s. c., 7 Am. Rep. 675, the signer read one paper to himself, while the other read aloud to him what as he read it purported to be a copy, and signed both, retaining the one he read, which was not a note. Held, by the trial court that he was liable on the other, which proved to be a note, in the hands of an innocent holder, at all hazards. On appeal this was reversed, and the question of negligence was held to be for the jury. (The syllabus in the American Reports seems to be partly incorrect.)

In *Walker v. Egbert*, 29 Wis. 194; s. c., 9 Am. Rep. 548, the defendant offered to prove that he was a German, unable to read or write English, and that the payee procured his signature by false and fraudulent representations of the character of the instrument, etc. This proof was rejected, and the plaintiff had judgment. Held, error. It will be noted that there was no offer to prove that the paper was read, or that there was no disinterested person present who might have read it to the defendant. This is directly contrary to *Fisher v. Von Behren*, *supra*.

In *Griffiths v. Kellogg*, 86 Wis. 290; s. c., 20 Am. Rep. 48, the payee's agent misread the amount of the note to the maker, a woman; she did not read it because she was unable to read without her glasses, and they were at the house of a neighbor: two of her children were present, able to read, but she did not ask them. This was submitted to the jury; they found for the woman (of course), and this was affirmed. The court said the jury were "better able to judge than we are whether her not appealing to her children for assistance was negligence under the circumstances."

In *Briggs v. Ewart*, 51 Mo. 245; s. c., 11 Am. Rep. 445, the defendant read and signed an order for pumps, and then without reading it signed what the other party said was a copy, which turned out to be a note. The trial court refused to instruct that if the defendant signed without fault or negligence, relying on the fraudulent representations, he was not liable to the innocent holder. Held, error.

In *Martin v. Smylee*, 55 Mo. 577, the defendant signed without reading, and it did not appear that he could not read. The court left it to the jury to say whether the signature was without fault or negligence, and they found for the defendant. Held, no error. This doctrine seems to stand alone. See *Chapman v. Rose*, *supra*.

In *Roach v. Karr*, 18 Kans. 529; s. c., 26 Am. Rep. 788, a wife signed a mortgage on the homestead, supposing it to be a note, as her husband told her on her inquiring what it was. She could read print but a little, and that only by spelling; she could not write nor read writing. She did not require the paper to be read to her. Held, that she was liable through negligence.

In *Douglas v. Matting*, 29 Iowa, 498; s. c., 4 Am. Rep. 238, the facts were substantially like those in the principal case, except that it did not appear that there was no one present who could read English. The defendant was held liable, the court observing: "It is better that defendant and others who so carelessly affix their names to paper the character

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of which is unknown to them, should suffer from the fraud which their recklessness invites than that the character of commercial paper should be impaired, and the business of the country thus interfered with and unsettled."

In *Fayette County Savings Bank v. Steffes*, 54 Iowa, 214, the maker signed a note, being unable to read English and relying on the other party's assurance as to the amount. It turned out to be for a larger amount than represented. The maker was held liable to a *bona fide* holder. The court observed: "As to whether the defendant was negligent or not in executing the note, under the circumstances disclosed in the evidence, the jury made no finding whatever. That it was incumbent upon him to show that he was free from negligence, we think, there is no doubt. It is not certain indeed that he could be allowed to set up the fraud as against the plaintiff, even by showing that he was free from negligence. In *Roland v. Fowler*, 47 Conn. 347, it was held that he who signs a note, knowing it to be a note, although he misunderstood its effect or was induced by fraudulent representations to execute it, is liable to a *bona fide* purchaser, irrespective of the question of negligence. It should be borne in mind that this case differs from a case where a person is induced by fraud to sign a negotiable note when he supposed he was executing an instrument of a different character. The defendant in this case intended to execute a negotiable note. In *Whitney v. Snyder*, 2 Lans. 477, the court say that where a person intends to execute a negotiable note, 'he is bound to know that he is furnishing the means whereby third parties may be deceived, and innocently led to part with their property upon the strength of his signature, in ignorance of the true state of facts.' A sharp distinction is made between such a case and one where the maker supposed that he was executing an instrument not a note. A different doctrine seems to have been held in *Griffiths v. Kellogg*, 39 Wis. 290; s. c., 20 Am. 1 ep. 43. The defendant relies upon this case. Whether a person who intends to execute a negotiable note is absolutely precluded from setting up fraud as a defense to it, against an innocent indorsee for value before maturity, we do not feel called upon to determine. It appears to us certain that he should be precluded from setting up fraud in such a case unless he could show himself free from negligence. In this case it was not only not so found, but the evidence is not set out. The answer shows that the payee who drew the note, and upon whose reading alone the defendant relied for knowledge of its contents, was a lightning-rod man. If he was an entire stranger, as may have appeared from the evidence, the jury might have believed that the defendant did not exercise proper care."

In *Ruddell v. Phalor*, 72 Ind. 533; s. c., 37 Am. Rep. 177, the defendants jointly answered that their signatures were procured by the payee's fraud and representation that the note was a different contract, and that one of the makers could not read English, and that the note was incorrectly and fraudulently read to him by the payee. *Held*, insufficient. The court said: "It may fairly be inferred from the silence of the paragraph on the subject that the other two makers of the note had been educated in English, and could readily read the English language. It seems to us the appellees were grossly negligent in confiding in 'the blandishments, flattery and persuasion of said Drake and Golden,' 'who were entirely unknown' to the appellees," etc. "The note in suit was obtained from them by and through their gross carelessness and undue confidence in strangers." "They should be required to answer and bear the loss occasioned or materially contributed to by their own folly and negligence." In *Ruddell v. Dillman*, 73 Ind. 518; s. c., 38 Am. Rep. 152, it was held that where one signs a negotiable note, relying on the fraudulent representations of the payee that it is something different, and makes no effort to ascertain its tenor, whether he can read or not, he is liable thereon to a *bona fide* holder for value.

But in *Webb v. Curbin*, 73 Ind. 403, between indorsee and maker, it appearing that at the time the defendant was very weak, sick and nervous, and his eyesight was so dim from disease and old age that he could not read either printing or writing, and he had lost his glasses, and so told the parties; that there was no person in the defendant's house at the time besides himself and the strangers aforesaid; that they said they would read the writing to him, and he relied upon them to read it to him correctly; that one of them pretended to read the contract to him; that as it was read, "it purported to be only a conditional agreement; *held*, that the defendant was not bound.

In *Dinsmore v. Stimburt*, 12 Neb. 433, the case of an innocent purchaser, an instruction which substantially told the jury to find for the defendant, if they should find from the

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evidence "that the defendant before signing said note, used the diligence and care that a man of ordinary care and prudence would have used under similar circumstances, to ascertain its contents," was held erroneous; and it was held that the jury should have been told, that to make such defense available, the defendant must show that he was not guilty of any neglect in signing the paper. The court said: "The true question was whether the defendant was tricked into signing the note by the artifice, device, and deception, or false reading, of the parties to whom he gave the note, or whether he was overcome by the glib tongue, winning manners, and over-persuasion of these men, and thus thrown off his guard, and acted without the use of due diligence in ascertaining the true nature and character of the paper which he signed." The court cited *Putnam v. Sullivan*, 4 Mass. 45, and remarked: "Whatever may have been the course of decisions for a number of years after the date of the above case, we think it is quite generally followed now. To apply its doctrine to the case at bar, if the defendant signed the note in question through misplaced confidence in Laird & Dezendorf, then he was guilty of negligence and want of due diligence, and the loss must fall upon him.

"In cases like this, where a note has passed into the hands of an innocent purchaser for value before maturity, we think that the defendant, before he can successfully defend on account of having been fraudulently induced to execute the note, must show a higher degree of diligence than that expressed in the instruction, in order to exclude the application of the rule, that where one of two innocent persons must suffer a loss by reason of the fraud of a third party, the loss must fall upon the one whose act has furnished the means for the commission of the fraud. The reason of the rule we suppose to be, that while he who has taken no part in the creation of the instrumentalities of fraud, could not have been guilty of negligence, or want of diligence, and thus contributed to the loss, the other could and possibly was." (Citing *Fraser v. McKinnon*, L. R., 4 C. P., 704; *Whitney v. Snyder* 2 Lans. 477, and *Chapman v. Rose*, 56 N. Y. 187; s. c. 15 Am. Rep. 401.) "We do not think it sufficient, in the language of the instruction, that the defendant should have 'used the diligence and care that a man of ordinary care and prudence would have used under similar circumstances,' in order to throw the loss on the *bona fide* purchaser for value before maturity, in the ordinary course of business, but that he should, in the language of BYLES, J., above cited, have been not guilty of any negligence in so signing the paper."

It would be impossible to reconcile these decisions and formulate a rule which will answer them all. While we would not venture to say that the principal case is not well decided, it is evident that it goes further — half a mile further — than any of the others in its requirement of vigilance. Some of the cases have not gone far enough as for example, *Griffiths v. Kellogg* and *Martin v. Smylee*, *supra*. Both of these cases were too plainly cases of gross negligence to be left to the jury. If any such case should be left to the jury, it will seem to a great many that the principal case should have been. But the rule it establishes is a safe one, namely, that the signer is bound to know what he is signing.

But in *Hopkins v. Hawkeye Insurance Co.*, 57 Iowa, 208, it was held that what constitutes reasonable care and diligence in the execution of an instrument is ordinarily a question of fact for the jury, and where a party trusts to the agent of the payee to read a note correctly, without calling upon a member of his family to read it for him before signing it is not, as a matter of law, negligence, as between the original parties. The court said: "The defendant asked the court to instruct the jury as follows: 'It was the duty of the plaintiff, O. W. Hopkins, to have read the notes and application signed by him on the 7th day of May, 1878, and if he was unable to do so because of having lost his spectacles, then he should have requested his wife or son to have read the same in his hearing, if they were present at the time, and if he failed to exercise such degree of diligence as above indicated, he was guilty of negligence, and is estopped to controvert the terms and conditions of said note and application in this action.' The refusal to give this instruction is assigned as error. It is to be observed that the question as to the alleged fraud in procuring the note arises in this case between the original parties to it, and not between the maker and a *bona fide* indorsee for value. In the case *Rogers v. Place*, 29 Ind. 577, it was held that 'In the absence of any device to put the party off his guard, an omission to read the instrument by one having the capacity to do so, will place him beyond the protection of the law.' To the same effect see the cases *Lubright v. Fletcher*, 6 Black. 380; *Nebeker v. Cul-*

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signer, 48 Ind. 436; *McCormack v. Molburg*, 43 Iowa, 561. It is incumbent upon the party executing an instrument to exercise reasonable care and diligence to ascertain its contents. Ordinarily however what constitutes reasonable care and diligence is a question of fact, to be determined by the jury in view of all the circumstances. In this case the plaintiff was unable to read the note on account of the absence of his spectacles. Whether he was justified in relying upon the reading of the agent, and in neglecting to call upon his wife or son who were present, constitutes not a question of law but one of fact. The question is 'did he act as persons of reasonable and ordinary care would usually do under like circumstances?' If he did he was not negligent. The evidence shows that the plaintiff had known Clark, the agent, for years, and had confidence in him. Whether he should have indicated the lack of confidence in Clark, which would have been implied in his calling upon his wife or son, was for the jury to determine. It cannot be declared that as a matter of law he was negligent in not doing so. This case is very like *Griffiths v. Kellogg*, 20 Wis. 290; s. c., 20 Am. Rep. 48, except that in that case the action was brought by an assignee for value. In that case the defendant's signature was procured to a note for the sum of \$78.25, which was read by the agent procuring it is for \$47.50. The defendant was unable to read the note without her glasses which were at a neighbor's. Two of the defendant's children were present who could read writing, but she did not ask them to read the note before she signed it. Judgment was rendered for the defendant in the court below, which, upon appeal, was affirmed. The court say: 'Whether the respondent, being unable to read the paper which she signed, was guilty of negligence to estop her from setting up this defense against a *bona fide* purchaser, was fairly submitted to the jury, and answered by their verdict for her. The jury who gave the verdict and the learned judge of the court below who refused a new trial, saw and heard the respondent and her children testify, and were better able to judge than we are whether her not appealing to her children for assistance was negligence under the circumstances.' See also *Taylor v. Alchison*, 54 Ill. 196; s. c., 5 Am. Rep. 119; *Walker v. Egbert*, 29 Wis. 194; s. c., 9 Am. Rep. 548. In our opinion the court did not err in refusing to give this instruction. The court correctly instructed the jury that whether the plaintiff was justified in trusting the agent to read the note correctly before signing it, or should have called upon the members of his family then present to read it for him, was a question of fact for them to determine from all the circumstances, and that he was required to do as a man of reasonable prudence would have done under like circumstances. This instruction properly presents the law upon this question."

In *Cole v. Williams*, 12 Neb. 440, a case between the original parties, the omission of the signer to read a contract, on account of the absence of his spectacles, and his trusting to the reading of it to him by the other party's agent, was held not to be such negligence or want of diligence as would warrant a recovery on the contract, which had been falsely read to the signer. The court said: "In point of view the signing of a written instrument without reading it, because of the temporary loss of one's spectacles, where the use of another pair could have been procured without much effort, or in such case relying upon an interested party on the other side to read it, when one's own friends or employees were near at hand, would be regarded as negligence, and the want of due diligence, in case it turned out that the paper signed was of a different character and import from that purporting to have been read and intended to be signed. But in this case the defendants are in no position to suggest the carelessness or want of diligence on the part of the plaintiff in relying on the good faith and truthful reading of their agent, even had his eye-sight been perfect or his spectacles at hand.

"In the case of *Dinmore v. Stimbart*, 12 Neb. 483, we have had occasion to review the authorities to some extent, and in order to do so have made a thorough examination of them. And while such examination led to the conclusion that to enable a party to resist the payment of a negotiable note in the hands of a *bona fide* purchaser for value before maturity in the ordinary course of business without notice, on the ground that such note was procured by fraud and circumvention on the part of the payees, the promisor being led by such fraud and circumvention to believe that he was signing an entirely different kind and character of instrument, he must show that he is not chargeable with any laches or negligence or misplaced confidence in others. But all the cases which lead to this conclusion lay much stress on the fact that the present holder of the note is absolutely innocent of any participation in fraud himself, and of knowledge of it in others."

CITY OF CRAWFORDSVILLE v. SMITH.

(79 Ind. 303.)

Negligence — proximate and remote cause of injury.

A municipal corporation, leaving a dangerous and unfenced excavation in a public street, is liable to the owner of a horse, carefully driven upon the street, which taking fright runs away, falls into the excavation, and is killed.

ACTION for killing of a horse by negligence. The opinion states the case. The plaintiff had judgment below.

E. C. Snyder, for appellant.

G. W. Paul, J. E. Humphries, J. Wright and J. M. Sellar, for appellee.

ELLIOTT, C. J. The material facts stated as the cause of action are these : Appellant is a municipal corporation ; one of its streets, called College street, runs up to the brink of an excavation twenty-five feet in depth ; on each side of this excavation College street is graded and gravelled, and is open for travel and is travelled to a point within a yard of the steep banks of the cut ; that appellant has not constructed a bridge over the excavation, nor in any way guarded or protected it, but has negligently suffered it to remain open and unguarded ; that on the night of the 6th day of March, 1880, appellee was driving along College street, using due care and skill, when his horse took fright, wheeled around, threw him from the buggy, ran away and into the excavation and was killed.

The contention of appellant is that the action cannot be maintained, because the negligence in leaving the excavation unguarded is not the proximate cause of the injury complained of. The general rule undoubtedly is that an action will not lie in cases of the class of which the present is a member, unless the negligence is shown to be the proximate cause of the injury. It is not difficult to state or to understand the rule, but its proper application to particular cases is sometimes a delicate and difficult task.

The appellant's counsel relies upon decisions of the courts of Maine and Massachusetts, and brings to our attention the following: *Bliss v. Wilbraham*, 8 Allen, 564 ; *Titus v. Northbridge*, 97 Mass. 258 ; *Fogg v. Nahant*, 98 id. 578 ; *Babson v. Rockport*, 101 id. 93 ;

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Moulton v. Sanford, 51 Me. 127. The decisions of the courts of these States cannot exert any material influence upon the case, for the reason that they rest upon peculiar statutory provisions. *Brookville, etc., Co. v. Pumphrey*, 59 Ind. 78.

The case of *Baldwin v. Greenwood's T. P. Co.*, 40 Conn. 238; s. c., 16 Am. Rep. 33, is strongly in point in appellee's favor. It was there held that a town was liable for injuries sustained by a horse taking fright, running away and falling from a defective bridge. It was there said: "Nor will the fact that the horse of the plaintiff was uncontrolled for some distance before the injury, change or in any way affect the liability of the defendants. The statute laws of our State impose upon towns and corporations the duty to keep their highways and bridges with sufficient railings in suitable repair. This is a positive duty, and the safety of the travelling community requires that it should be rigidly enforced." This case is fully approved in the later case of *Ward v. Town of North Haven*, 43 Conn. 148. The doctrine of the cases cited is that of the Supreme Court of Vermont. In *Hodge v. Town of Bennington*, 43 Vt. 450, it was said: "But there has been a long and unbroken line of decisions in this State, that 'if the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants are liable.'" *Hunt v. Pownal*, 9 Vt. 411. Another New England court, that of New Hampshire, holds the same doctrine. *Winship v. Enfield*, 42 N. H. 197; *Kelsey v. Glover*, 15 Vt. 708. The New York cases declare a like rule. *Ring v. City of Cohoes*, 77 N. Y. 83; s. c., 33 Am. Rep. 574; *Kennedy v. Mayor*, 73 N. Y. 365; s. c., 29 Am. Rep. 169; *Clark v. Union Ferry Co.*, 35 N. Y. 485; *Radway v. Briggs*, 37 id. 256. The subject has had careful investigation from the courts of Pennsylvania, and has received the same solution as that given in the cases to which we have referred. *Hey v. Philadelphia*, 81 Penn. St. 44; *Township of Newlin v. Davis*, 77 id. 317; *Lower Macungie Tp. v. Merkhoffer*, 71 id. 276. In Iowa the same rule is established. *Manderschid v. City of Dubuque*, 25 Iowa, 108. This is also the doctrine of the courts of Illinois and Missouri. *Lacon v. Page*, 48 Ill. 499; *Chicago v. Gallagher*, 44 id. 295; *Joliet v. Verley*, 35 id. 58; *Hull v. Kansas City*, 54 Mo. 598; s. c., 14 Am. Rep. 487. We think the rule declared in the cases we have cited is sound, and that it is in harmony with the general current of our own decisions.

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It is firmly established by the adjudged cases in our own reports that a municipal corporation is charged with the duty of maintaining its streets and highways in a reasonably safe condition for travel. *City of Delphi v. Lowery*, 74 Ind. 520 ; s. c., 39 Am. Rep. 98 ; *City of Indianapolis v. Dougherty*, 71 Ind. 5 ; *City of Logansport v. Dick*, 70 id. 65 ; *Grove v. City of Ft. Wayne*, 45 id. 429 ; s. c., 15 Am. Rep. 262.

This duty is owing to all who have a right to use the highway, and who in using it exercise ordinary care and prudence. The right to recover for injuries resulting from a neglect of this duty cannot be defeated upon the ground that some accident concurred with the defective condition of the highway in producing the injury. It is well settled that where the negligence of the defendant is the cause of the injury an action will lie, although there may have been some intervening agency. *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166 ; s. c., 40 Am. Rep. 230.

These settled principles lead to the conclusion, that where a horse takes fright and runs away and is injured because of the negligence of a municipal corporation in leaving a dangerous excavation in a street unprotected, an action may be maintained against the corporation, provided of course the driver of the horse exercised due care and skill in driving and managing it.

Judgment affirmed.

YONOSKI V. STATE.

(79 Ind. 303.)

Sunday — " necessity "—repairing railway.

It is lawful to make necessary repairs of a railway track on Sunday in order to avoid delaying trains on week days.*

CONVICTION of Sabbath-breaking. The opinion states the case.

N. O. Ross and G. E. Ross, for appellants.

*To same effect, *Phel., Wilm. & Balt. R. Co. v. Lehman* (56 Md. 209), 40 Am. Rep. 415, and note, 418.

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D. P. Baldwin, attorney-general, *J. B. Peterson* and *W. W. Thornton*, for State.

Howk, J. This prosecution was commenced upon affidavit, before a justice of the peace of Pulaski county, on the 21st day of September, 1881. The affidavit charged in substance, that on the 18th day of September, 1881, at said county, the appellants, Frank Yonoski, Abraham Timmins, T. B. Fowler and Pat Purcell and one Dague Winn, all at that time over fourteen years of age, said day being the first day of the week commonly called Sunday, were found unlawfully at common labor and engaged at their usual vocations, to wit: Then and there working on the track of the Pittsburgh, Cincinnati and St. Louis railroad, such common labor and usual vocation not being then and there work of charity or necessity, and the said appellants and Dague Winn not being then and there persons who conscientiously observed the seventh day of the week as the Sabbath, nor travellers, a family removing, keepers of a toll-gate or toll-bridge, or ferryman acting as such, contrary to the form of the statute, etc.

On the trial of the cause before the justice the appellants were each found guilty, as charged in the affidavit, and judgment was rendered against each of them for a separate fine and costs; and from this judgment they appealed to the Circuit Court. There the State moved the court for leave to file a substituted affidavit, which motion was granted, and over the objection and exception of the appellants, the State was permitted to file such substituted affidavit. On arraignment thereon and a plea of not guilty, the issues joined were tried by a jury, and a verdict was returned, finding the appellants guilty as charged, and assessing their punishment at a fine in the sum of eight dollars. The appellants' motion for a new trial, and the separate motion of each of them in arrest of judgment, was overruled by the court, and to each of these rulings they and each of them excepted. Judgment was then rendered against all the appellants jointly for the fine assessed and the costs of the prosecution.

The appellants have here assigned, as errors, the following decisions of the Circuit Court:

1. In overruling their motion to dismiss the cause, for the want of a sufficient affidavit;
2. In permitting the State to file a substituted affidavit;

3. In overruling the motion for a new trial ; and
4. In overruling the motion in arrest of judgment.

The important and controlling questions in this case arise under the alleged error of the court in overruling the motion for a new trial. The appellants' counsel concede that the evidence in the record makes out a case against each of the appellants for a violation of the law for the protection of the Sabbath, unless the evidence shows that the labor they were engaged in was a work of necessity, within the meaning of that expression as used in the statute. The appellants were the servants and employees of the Pittsburgh, Cincinnati and St. Louis Railway Company, and the affidavit charged that they were working on the track of said company's railroad. If the work, in which they were engaged, was a work of necessity to the railway company, within the meaning of the statute, then it is clear, we think, it was also a work of necessity on the part of the appellants, as the servants of such company.

There is no conflict in the evidence in regard to the necessity for the work, or to the necessity for doing such work, on the first day of the week commonly called Sunday. The only question in the case is this : Was the work, in which the appellants were engaged, such a work of necessity as fairly comes within the purview and meaning of that expression, as the same is used in the statute for the protection of the Sabbath ?

The evidence on the point under consideration consisted of the testimony of those persons who were in charge of the construction, repair and maintenance of the company's line of railway. This evidence is too long to be set out in full, in this opinion ; but it showed very clearly, we think, that the work in which the appellants were engaged, and for which they were prosecuted in this case, was a work of necessity, and that there was a real necessity for the doing of this work on Sunday ; that the work in question was the taking up an old switch and putting in a new one, and could not be accomplished in less time than eight hours ; that this work could not have been done on any day of the week, except Sunday, without delaying four of the company's trains, and that Sunday was the only day of the week on which the work could be done without delaying such trains ; and that the track of the railroad was then in very bad condition, and the railway company was engaged in taking up the old iron rails, and replacing them with steel rails,

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but the change of switches could not be made except on Sunday without the delaying of trains.

We are of the opinion, that the uncontradicted facts of this case clearly show that the work, in which the appellants were engaged and for which they are prosecuted, was a work of necessity, within the meaning of the statute for the protection of the Sabbath. In *Morris v. State*, 31 Ind. 189, this court cited the case of *Flagg v. Inhabitants of Millbury*, 4 Cush. 243, and quoted therefrom, with approval, the following language: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may be deemed necessity within the statute." This view of the meaning of the word "necessity," as used in the Sunday law, has been approved in a number of the later decisions of this court. *Crocket v. State*, 33 Ind. 416; *Wilkinson v. State*, 59 id. 416; s. c., 26 Am. Rep. 84; *Edgerton v. State*, 67 id. 588; s. c., 33 Am. Rep. 110; *Turner v. State*, 67 Ind. 595.

Doubtless there was no physical or absolute necessity in the case at bar, requiring the railway company to cause the work, in which the appellants were engaged, to be done on Sunday. But the necessity for doing the work on that day, rather than on some other day of the week, grew out of and was incident to the particular business in which the railway company was engaged; for delays in the running of its trains, and in the transaction of its business, might and probably would injuriously affect not only the company, but also the general public. Therefore it seems to us the undisputed facts of this case clearly show, that the work in which the appellants were engaged was a work of necessity, within the meaning of that expression, as used in the statute for the protection of the Sabbath. It follows that the verdict of the jury was not sustained by sufficient evidence, and was contrary to law; and for these causes the appellants' motion for a new trial ought to have been sustained.

Some other questions are discussed by counsel, but the conclusion we have reached renders it unnecessary for us to consider or decide them.

The judgment is reversed, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Judgment reversed.

Cummins v. City of Seymour.

CUMMINS V. CITY OF SEYMOUR.

(79 Ind. 491.)

Municipal corporation — right to drain through highway outside — letting work.

A municipal corporation exercising ordinary care and skill may use a public way, lying outside its boundaries, for the purpose of drainage, without any liability for damages to adjacent property owners.

A city is not bound to let public work to contractors.

ACTION of damages to real property. The opinion states the case. The defendant had judgment below.

W. K. Marshall, for appellant.

F. T. Hord and *W. B. Hord*, for appellee.

ELLIOTT, C. J. Lands lying near but outside of the corporate limits of the city of Seymour were laid off into lots and streets and highways provided for. After the lots had been laid off and a plat made, appellant became the purchaser of one of the lots abutting upon a public way extending into the city of Seymour; improvements were made by him on his lot and a fence constructed along the line of the public way. Sometime afterward the municipal authorities caused a wide ditch to be dug along the side of the way, and did this without having tendered the appellant any compensation. In constructing this ditch large quantities of earth were thrown out upon the highway, and by this act the corporation obstructed the way and destroyed the grade. The ditch receives the waters of a stagnant pond and conducts them past the appellant's property, and also receives and carries off noisome fluids from the gutters and drains of the city, and from the drains of a woollen mill situated within the corporate limits. Noxious and unwholesome smells arise from the fluids collected in the ditch and spread over the appellant's land and house, rendering his house unhealthy and making it impossible for him to rent his property. Before the construction of the ditch no noisome fluids flowed by appellant's land, and from that annoyance it was entirely free. The natural flowage of the drainage of the city of Seymour and of the waters of the stagnant pond was changed by the construction of the ditch, and

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the drainage of the city and the waters from the pond made to flow by the appellant's land. We have omitted the epithets and merely formal statements of the appellant's complaint, but have given in the foregoing synopsis the material facts which it contains. A demurrer was sustained to the complaint and this appeal requires us to decide whether this ruling was right or wrong.

It is well settled that the doctrine of *respondeat superior* applies as well to public as private corporations. The difficulty of determining who are officers and servants is much greater in the one case than in the other, but there is no doubt at all as to the applicability of the rule to municipal corporations. The confessed allegations of the complaint make it clear that the relation of principal and agent and of master and servant existed between the appellee and those employed in opening the ditch.

A municipal corporation is not bound to let all public work to contractors. There is no such a requirement in the general act for the incorporation of cities. Sewers, bridges and the like, may be built by the officers of the city, if the governing corporate officers deem it expedient. There are many provisions in the general act conferring full authority upon cities to do such work through their own officers and servants. As shown in *City of Aurora, v. Fox*, 78 Ind. 1, the expressions in *City of Delphi v. Evans*, 36 id. 90; s. c., 10 Am. Rep. 12, indicating that all public work must be let to contractors, are not correct statements of the law and did not constitute any part of the decision of the court. It is very evident that the court did not concur in the views upon this subject of the judge by whom that opinion was prepared. It can not be correctly held that the appellee could not have done the work described in the complaint through its own officers and servants. The power to so perform the work the corporation unquestionably possessed, and the complaint explicitly avers that it was done by the corporate officers, agents and servants.

We yield full assent to the doctrine that consequential injuries resulting from the construction of municipal improvements in the streets of the city, such as drains and sewers, are not within the provisions of the Constitution prohibiting the taking of private property for public use without compensation first paid or tendered. We fully approve the rule that where municipal improvements are made with ordinary care and skill, the corporation is not responsible for injury resulting to adjacent property. *Weis v. City of Madi-*

son, 75 Ind. 241; s. c., 39 Am. Rep. 135; *Macy v. City of Indianapolis*, 17 Ind. 267; *City of Lafayette v. Bush*, 19 id. 326.

For an error in the exercise of a legislative power, a municipal corporation is not liable; nor is it liable for failure to undertake public improvements unless such improvements are made necessary by some act of its own. *Stackhouse v. City of Lafayette*, 26 Ind. 17; *City of Logansport v. Wright*, 25 id. 512; *Roll v. City of Indianapolis*, 52 id. 547. Where however ministerial acts are undertaken, the corporation is bound to the exercise of reasonable skill and ordinary care. For a failure to exercise such skill and care, the corporation is liable to one who suffers injury because of the negligent omission to use the requisite degree of care and skill.

It has been a much debated point whether a municipal corporation is liable for a negligent error in the plan of a drain or sewer. It is conceded on all sides that there is liability where there is want of skill or care in the mechanism; but there are very many cases holding that there is none where the defect is in the plan. As shown in *Weis v. City of Madison*, *supra*, our cases have uniformly held that the corporation is liable for negligent error in the plan. *City of Indianapolis v. Huffer*, 30 Ind. 235; *City of Indianapolis v. Lawyer*, 38 id. 348; *City of Indianapolis v. Tate*, 39 id. 282. The opinion expressed by Judge Dillon in the last edition of his work, is in harmony with the decisions of this court, as is fully evidenced by the extract quoted in *Weis v. City of Madison*, *supra*. We are not disposed to depart from the rule which has so long prevailed in this State. We are satisfied that it is a sound salutary one, and we know that it is growing in favor with the text-writers and the courts. A slight change in the facts of the case in hand would make it a striking illustration of the wisdom of the rule. Let it be added to the facts stated, that the ditch is to be a permanent one, occupying ten feet of the way, with banks on each side four or five feet high and as many broad, thus occupying the entire way, and rendering it unsuitable for travel. If the facts supplied by our supposition were all in the complaint, we think the plainest principles of justice would require that relief be granted adjoining proprietors. One would think that the property owner was quite as seriously injured by the lack of skill in devising the plan as he could possibly be by any want of care or skill in the performance of the work. Whether the unskilfulness of the plan or the negligent manner of executing it destroyed the highway, the in-

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jury would be the same. The true rule, reasonable in itself and just in its results, is that the skill and care must extend both to the plan and its execution. The appellee's contention that an action will not lie where the only want of skill is in devising the plan can not prevail.

A municipal corporation, having authority to construct a drain or sewer in a public street, must necessarily be allowed a reasonable time in which to do the work, and must also be allowed to obstruct the street for a reasonable length of time, although inconvenience and injury may result to citizens and property. Having a right to do the work, the corporation must have all the incidental powers necessary to effectuate the principal power. But in performing the work, the corporation acts ministerially and must proceed with ordinary diligence, skill and care. The work must be prosecuted with reasonable diligence, for the corporation has no right to obstruct the public highways for an unreasonable length of time. The diligence required is not confined merely to the skill and care required to do the work properly and make it safe, but it also extends to the time within which it must be done. The complaint before us does not show that the corporation is not prosecuting the work with reasonable diligence. It does not show that the obstruction of the highway is intended to be a permanent one. For any thing that appears, reasonable diligence was exercised. There is nothing to show that the corporation does not intend to make the public way safe and convenient for travel. It may well be inferred that the corporation will complete the drain in a proper manner and leave the highway in good condition. It does not even appear that the ditch is a permanent one or that it is to be kept open. It can not be presumed for the purpose of making out a cause of action in favor of appellant, that the corporate officers will violate the law and perpetrate a wrong. The presumption is the reverse. Until the contrary appears the officers of a public corporation are presumed to have done their duty. *Sims v. City of Frankfort*, 79 Ind. 446.

Material facts essential to the existence of a cause of action should be positively alleged. They should not be left to be gathered by mere conjecture, nor should they be stated by way of recital. *Jackson School Tp. v. Farlow*, 75 Ind. 118.

The appellant contends that the municipal authorities have no power to put ditches or drains in highways outside of the city limits,

and that it is therefore not necessary for the complaint to show that there was lack of diligence, skill or care in the performance of the work. If appellant is right in his assumption that the corporate officers had no power to construct the drain outside of the city limits, his case is at an end, for he can not maintain an action against the municipality. This doctrine is thus expressed in *Smith v. City of Rochester*, 76 N. Y. 506 : "The doctrine is well settled, that municipal corporations are within the operation of the general rule of law, that the superior or employer must answer civilly for the negligence or want of skill of an agent or servant in the course of their employment, by which another is injured. It is essential however to establish such a liability, that the act complained of must be within the scope of the corporate powers, as provided by charter or positive enactment of law. If the act done is committed outside of the authority and power of the corporation as conferred by statute, the corporation is not liable, whether its officers directed its performance, or it was done without any express direction or command." The leading American case upon this subject is that of *Mayor v. Cunliff*, 2 N. Y. 165, and this court has in many cases given its approval to the rule there declared. In *Browning v. Board Com'rs*, 44 Ind. 11, the court cited with approval the case named and many others, and declared that the officers of a corporation are the mere agents, and where they transcend the boundaries prescribed for them, the corporation is no more bound by their acts than any individual by the unauthorized act of his agent. In the earlier case of *Johnson v. Common Council*, 16 Ind. 227, the same general principle was recognized and enforced. In the later case of *Haag v. Board Com'rs*, 60 Ind. 511; s. c., 28 Am. Rep. 654, the doctrine of *Browning v. Board, etc.*, is approved and the statement of the rule made by Judge Dillon is recognized as a correct enunciation of the law. In the latest case upon this subject, that of *Driftwood V. T. Co. v. Board Com'rs*, 72 Ind. 226, the principle stated found full and forcible recognition, all the more forcible because of the sharply defined distinction there made between officers of public corporations and agents of private ones. If appellant's proposition, that the city officers wrongfully went outside of the corporate limits, could be maintained, it would defeat his action ; he would, in that event, "be hoist by his own petard." But his proposition can not be sustained.

The municipal officers have power to construct drains in public

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highways outside of the city limits. It is provided in subdivision 26 of section 53 of the act for the incorporation of cities, that the corporate authorities, "for the purpose of drainage of such city, may go beyond the city limits and condemn lands and materials and exercise full jurisdiction, and all the necessary power therefor." There are other provisions in the act conferring authority upon municipal officers to go beyond the corporate limits for the purpose of doing acts essential to the public welfare.

The question next encountered is whether the municipal corporation has a right to use a public way lying outside of its boundaries, for the purposes of drainage, without paying or tendering damages to adjacent property owners. We have already seen that it has been long and firmly settled, that a municipal corporation is not liable for consequential injuries, resulting from improvements made in or upon the streets of the corporation to property abutting upon the streets of the municipality. We are now to inquire whether a different rule obtains where the injury results from the construction of drains in highways which lie outside the corporate limits.

Highways, whether within or without the limits of a municipal corporation, are subject to legislative control, provided that their character as highways may not be entirely divested. In *Common Council of Indianapolis v. Croas*, 7 Ind. 9, it was held that an abutter has a private right distinct from that of the public, which the legislature can not take away. This doctrine has often been approved. *Haynes v. Thomas*, 7 Ind. 38 ; *Tate v. O. & M. R. R. Co.*, id. 479 ; *Protzman v. Indianapolis, etc., R. Co.*, 9 id. 467 ; *State v. Berdette*, 73 id. 185 ; s. c., 38 Am. Rep. 117. It is not, however to be inferred from this doctrine, that public highways may not be used for public purposes other than that of travel. although this is undoubtedly the primary purpose for which highways are established. It may be and probably is true, that no public use can be authorized which will deprive the way of its character as a public road, which every citizen has a right to use for the purpose of travel. Subordinate to this one great and primary purpose are other uses which may lawfully be made of a highway. An American writer says :

"The power of the public, or of municipal corporations acting in the public behalf, over highways, is not restricted to their use for the mere purpose of transit. It extends to the promotion of the

public convenience by the laying of water-pipes and gas-pipes in the streets of cities ; and to the promotion of the public health by the construction of drains and sewers, or making any other changes therein. And any injury which results to individuals from such a use of the public streets, unless there be a lack of proper care, is *damnum absque injuria*. Thus it has been decided that a city has the right to fill up a water-course, if that be the best means of remedying a nuisance which it occasions, and that the fact that a riparian proprietor is thereby deprived of his right to pass and re-pass upon the water-course from his land to the sea, or is damnified by the noisome smells generated by the stagnation of the water, does not entitle him to damage. Such a proceeding stands on the same footing as quarantine or fire regulations, from which if the individual receives damage, the law presumes him to be indemnified by sharing their advantages, and holds it to be *damnum absque injuria*. And it makes no difference though the regulations thus made be of such a character as to suspend the enjoyment of the property in the sole mode in which the party plaintiff is entitled to use it." Angell on Highways, § 216.

There are many authorities cited in support of the text, but we do not deem it necessary to approve or disapprove of the extent to which the doctrine is carried by the author, but we do sanction his statements in so far as they declare that many public uses other than that of travel may be made of highways without entitling adjoining proprietors to compensation. Judge Dillon says that the highways of a State are under the paramount and primary control of the legislature, and that they may be devoted to other public uses than those of travel. 2 Dill. Mun. Corp., §§ 656, 688. It is clear upon principle as well as authority, that the legislature may delegate power to municipal corporations to make use of highways for the purpose of drainage. In such a case the municipality is in some sense the agent of the State. It was said by the Supreme Court of the United States, in *Transportation Co. v. Chicago*, 99 U. S. 635, that " it is undeniable that in making the improvements of which the plaintiffs complain " (constructing a tunnel) " the city was the agent of the State, and performing a public duty imposed upon it by the legislature ; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike

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in England and in this country." Further on in the same opinion, it is said :

"The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility of course should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy therefore for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give."

Judge Cooley maintains the general doctrine, that consequential damages, flowing from the construction of public improvements, will not give a right of action. Cooley's Const. Lim. 676 (4th ed.). It must be held upon principle as well as upon authority, that the legislature may authorize the reasonable use of highways by a municipal corporation for the purposes of drainage, whether such highways are within or without the territorial limits of the corporation. If this be correct, then it must follow that for consequential injuries, resulting from the proper and reasonable exercise of such authority, there can be no recovery, since to hold otherwise would be to declare that for the performance of a lawful act in a lawful manner a public corporation may be treated as a wrongdoer, and as such mulcted in damages. It would violate all principles of logic as well as of law to hold that one who had committed no tortious act, but had done what the law authorized and in the manner prescribed by law, should be held to the same responsibility as are those who are guilty of actionable torts.

The complaint, as we have seen, is not so framed as to show that the drain is a permanent one, destroying the whole highway for the purposes of travel, and we are not therefore called upon to decide whether a highway can be taken and so used for drainage purposes as to cut off all means of ingress and egress to and from abutting lands. Judge Cooley cites our own and other cases holding that abutters have a private right distinct from the public, of which they can not be deprived without compensation. Const. Lim. (4th ed.) 679, n. 1. It is a very grave question whether the entire destruction of a highway by conversion into an open drain is not such an invasion of private right as to give a complete cause of

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action. But as the complaint fails to properly show a permanent occupancy of the way, we regard this question as not fairly in the record.

We have no difficulty in agreeing with appellee's counsel, that one who sustains an injury in common with the public from the obstruction of a highway can not maintain a private action. This rule is as old, at least, as *Fineux v. Hovenden*, Cro. Eliz. 664, where there was an unlawful obstruction of a public way, and it was held that "without a special grief shown by the plaintiff, the action lies not, but it is punishable in the leet." Our own court has recognized and enforced this doctrine. *McCowan v. Whitesides*, 31 Ind. 235. But while this is sound doctrine, it is equally well settled that where one does sustain a special injury, different in character from that sustained by the public, he may have his action. *Ross v. Thompson*, 78 Ind. 90. It is undoubtedly true that the special injury is the gist of the action, and that facts showing such an injury must be alleged. Where it appears that lands abut upon a highway, and that the highway supplies the only means of ingress and egress, and that the obstructions permanently destroy the way, a special injury is shown. *Ross v. Thompson*, *supra*, and authorities there cited. If a person is by an unlawful act deprived of all means of getting to and from his property, he suffers an injury different not only in degree, but in kind, from other citizens. The right to free passage upon a highway is a common right, to be vindicated otherwise than by a private action; but the unlawful destruction of the means of access to private property affects the individual owner, and not the public. A right of access to one's own property is a private right to be vindicated by a private action or not at all. We are not of course speaking of cases where the access is made more difficult or the route more circuitous, but of cases, such as the complaint attempts to make, of total deprivation of the right. But we come again to the infirmity in the complaint. We can not conclude as matter of law from the facts stated that there is any thing more than a reasonable and temporary use of the highway for a lawful purpose.

The judgment must be affirmed.

Judgment affirmed.

Catterlin v. City of Frankfort.

CATTERLIN V. CITY OF FRANKFORT.

(79 Ind. 547.)

Municipal corporation — action over for nuisances.

If a municipal corporation is held by judgment for damages in consequence of the unsafe condition of its sidewalk, it has a remedy over against the person causing the nuisance, unless as between it and him it was itself a wrong-doer; but such person is not concluded by such judgment unless he had notice of and an opportunity to defend that action; and if he had not, the injured person must be shown to have been free from negligence.

ACTION over for damages. The opinion states the case. The plaintiff had judgment below.

J. N. Sims, for appellant.

O. E. Brumbaugh, W. R. Hines and J. Claybaugh, for appellee.

WORDEN, J. Amended complaint by the appellee against the appellant, as follows :

“The plaintiff complains of the defendant and says, that prior to the 29th day of June, 1878, the defendant constructed in and upon a certain sidewalk within the town of Frankfort, in Clinton county, Indiana, which sidewalk was and is on the east side of Main street in said town, and extending there along north from Washington street in said town, a certain iron picket fence along and upon the edge of an excavation which said defendant had also dug and constructed; that from the time of said construction said defendant had kept and maintained said picket fence and said excavation in and upon said sidewalk in said town of Frankfort, and in the city of Frankfort, Clinton county, Indiana, which was at the time of said construction the town of Frankfort, but now is, and was on said 29th day of June, and has been ever since, the city of Frankfort; that said defendant so erected, constructed and maintained said picket fence in and upon said sidewalk along the edge of said excavation, wrongfully and without the authority of said town (now city) of Frankfort; that on the said 29th day of June, 1878, in the night time thereof, one John D. Kersey, while passing upon and along said sidewalk, fell upon said picket fence and thereby

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sustained severe personal and bodily injury ; that afterward, to wit, at the October term, 1878, of the Clinton Circuit Court, the said John D. Kersey entered and instituted suit against the plaintiff, the city of Frankfort, for the damages he had sustained by falling upon said picket fence, and such subsequent proceedings were had in said court in said suit as that, on the ——— judicial day of said term of said court, the said John D. Kersey obtained a judgment in his favor against said city for damages on account of said injury, in the sum of \$300, and for the further sum of \$41.20 costs ; that said city appeared and defended said action by her regularly appointed attorneys and by able and competent attorneys specially employed by her to assist in the defense of said action ; that after the rendition of said judgment and before the bringing of this action, to wit, on December 7, 1878, said city fully paid said judgment for damages and costs in the sum of \$341.20 ; that defendant is indebted to plaintiff on account of, and for the repayment of said damages and costs in the sum of \$341.20, and interest on the same at the rate of six per cent per annum from the date of the payment of the same by said plaintiff, which amount is wholly due and unpaid. Wherefore," etc.

Demurrer to the complaint for want of sufficient facts overruled, and such further proceedings were had as that judgment was rendered for the plaintiff.

The question is presented, whether the complaint stated facts showing that the plaintiff was entitled to recover.

We quote section 1035, 2 Dill. Mun. Corp. (3d ed.), as containing a summary of the law applicable to the case :

“ If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrong-doer, as between itself and the author of the nuisance ; and if the latter had notice of the pendency of the action against the municipality, and could have defended it, he has been held to be concluded as to the existence of the defect or nuisance in the street, and as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damages or injury it occasioned. But although duly notified, he is not, says the Supreme Court of the United States, ‘ estopped from showing that he was under no obligation to keep the street in a safe

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condition, and that it was not through his fault that the accident happened.' ”

As there is no allegation in the complaint that the defendant had notice of the action of Kersey against the city, and an opportunity of defending it, his liability is not shown to be established by the judgment.

In such case, in order to make the complaint good, it should at least show such a state of facts as would have made the defendant liable to Kersey, had the latter brought his action against the defendant instead of the city. This the complaint does not do. It does not allege in any manner that Kersey was free from negligence contributing to his injury. For this reason the complaint was insufficient.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Judgment accordingly.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BELDING V. FRANKLAND.

(8 Lea, 67.)

Sale — fraud — insolvency.

Where one buys goods intending not to pay for them, the vendor may recover the goods from his assignee. (*See note, p. 688.*)

THE opinion states the case.

W. R. McNeily, for Belding Bro. & Co.

Smith & Allison, for Frankland.

COOPER, J. An agreed case to test the question whether the vendor or the assignee of the vendee under a general assignment for the benefit of creditors has the better title to certain goods. The trial judge found in favor of the defendant, the assignee, and the plaintiffs appealed.

On November 3, 1881, B. Levison & Bro., merchants at Nash-

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ville, ordered goods from Belding Bros. & Co. at Cincinnati, to the value of \$153. The goods were shipped from Cincinnati on November 4, 1881. On the 7th of the same month, Levison & Bro. made an assignment of their stock to J. Frankland as trustee for the benefit of all their creditors. The assignment conveys "all of our property of every description, the same being embraced in a schedule herewith annexed, and made a part of this conveyance." The goods in controversy were not mentioned in the schedule, nor were Belding Bros. & Co. named in the schedule of creditors attached to the assignment. There is a provision in the assignment that any creditor of the assigning firm shall share in the benefits of the conveyance although omitted from the schedule. The trustee, upon the execution and registration of the assignment, immediately took possession of the effects conveyed, and began to execute the trust, but the goods of Belding Bros. & Co. had not then reached Nashville. Afterward the goods arrived and were delivered by the carrier to the drayman, who had been, previous to the assignment, employed by Levison & Bro., with authority to receive and receipt for goods consigned to the firm. This authority had not been revoked and no special authority had been conferred upon him after the execution and registration of the assignment. The drayman receipted for the goods in his own name, and delivered them to the trustee. After the goods were received by the trustee, Levison & Bro. expressed to him the desire that as they had not been paid for, they should be shipped back to Belding Bros. & Co. The trustee acting under legal advice took charge of the goods, claiming them as part of the assets of Levison & Bro., but kept the proceeds of their sale separate from the other assets, in order to prevent complication in the event of litigation. On November 12, 1881, Belding Bros. & Co., after the goods had been received by the trustee, wrote to their attorney at Nashville to stop the goods in transit, and if they had been delivered after the execution of the assignment to take charge of them.

[Minor inquiry omitted.]

It is now well settled both in England and America that if a person purchase goods with the fraudulent intention of not paying for them, the vendor may disaffirm the sale, although the goods be delivered, and revest the property in him and recover them by action against the vendee. *Load v. Green*, 15 M. & W. 216; *Stewart v. Emerson*, 52 N. H. 301; *Kline v. Baker*, 99 Mass. 253; *Cary v.*

Hotailing, 1 Hill, 311. The mere insolvency of the purchaser without more, will not suffice to avoid the sale. *Ex parte Whittaker*, L. R., 10 Ch. App. 448; *Nichols v. Pinner*, 18 N. Y. 300; *Rowley v. Bigelow*, 12 Pick. 307 (23 Am. Dec. 607). Yet the fraudulent intent may be deduced from the facts and circumstances without any actual representations, full knowledge by the purchaser of his insolvency being always a controlling element. *Hennequin v. Naylor*, 24 N. Y. 139; *Thompson v. Rose*, 16 Conn. 71; *Talcott v. Henderson*, 31 Ohio, 162; s. c., 27 Am. Rep. 501. If the vendor may recover possession of the goods against the vendee, he has the same right against an assignee under a voluntary assignment for the benefit of creditors who stand in the shoes of the assignor. *Nichols v. Michael*, 23 N. Y. 264. The rule is general in the absence of a statute or fixed statutory policy to the contrary, that a title or equity good against a party will be equally good against an assignee under a voluntary assignment to secure pre-existing debts. *Turner v. Petigrew*, 6 Humph. 440; *Brown v. Vanlier*, 7 id. 239; *Fawell v. Heelit*, Amb. 726; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Keeler v. Field*, 1 Paige, 312; *Harding v. Metz*, 1 Tenn. Ch. 610. And *a fortiori*, against an assignee by operation of law, as an assignee in bankruptcy, who, it has been held by the very highest authority, in precisely this class of cases takes only the defeasible title of the bankrupt purchaser, and must yield to the vendor upon a prompt disaffirmance by him of the contract. *Donaldson v. Farwell*, 93 U. S. 631. The latest decision on this subject holds that while silence is not fraud, concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent, and the vendor is entitled to recover the property from the vendee's voluntary assignee; *Davis v. Stewart*, 8 Fed. Rep. 803, an abstract of which is given in 24 Alb. L. J. 515. And it seems to have been held that the receipt of goods by an insolvent, with design not to pay for them, would avoid the sale although he had no such design when he ordered them. *Pike v. Wieting*, 49 Barb. 314.

In the case before us the facts disclosed leave no doubt that Levi-son & Bro. were utterly insolvent at the time of their purchase of the goods from Belding Bros. & Co., and must have known the fact, their assignment having been made only three days after the shipment of the goods. They did not include the goods in their assignment to the defendant, nor mention the plaintiffs in their schedule of liabilities, and as soon as they learned that the goods had been

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received by the defendant they desired him to ship them back to the plaintiffs. There is therefore in this case knowledge of insolvency by the purchasers at the time of the purchase, concealment of the fact, actual insolvency before a receipt of the goods, and a refusal of the purchasers to recognize the goods as belonging to them. If the suit was against the purchasers there would be no doubt of the right of the plaintiffs to recover the property. The defendant has only title by operation of law if he has title at all, and stands in the shoes of his assignors.

It appears from the opinion of the trial judge, which is in writing and filed with the record, and the fact is conceded in the arguments of the counsel, that this view of the case was not presented to the judge nor considered by him. His opinion rested entirely upon the ground that the title to the goods vested in the purchasers by the delivery to the carrier, and passed by virtue of the act of 1881 to the defendant.

Reverse the judgment and enter judgment here in favor of the plaintiffs in accordance with the agreement of the parties.

Judgment reversed.

NOTE BY THE REPORTER.—To same effect, *Loeb v. Flash*, 65 Ala. 526; *Burrill v. Stevens*, 73 Me. 395; a. c., 40 Am. Rep. 366. Where a vendee is insolvent at the time a purchase is made, and does not expect to be able to pay for the goods purchased, the vendor is entitled to possession as against such a vendee's voluntary assignee. It is not necessary to allege or show false pretense or other direct artifice. When no questions are asked, no false pretenses, no artifice resorted to, silence is not fraud; but concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent. See *Thompson v. Rose*, 16 Conn. 71, 81; *Johnson v. Monell*, 2 Keyes, 655; *Powell v. Bradley*, 9 Gill & J. 200, 243, 273; *Talcott v. Henderson*, 31 Ohio St. 162; a. c., 37 Am. Rep. 501, note, and p. 301. *Donaldson v. Farwell*, 98 U. S. 681, is not in conflict with the view expressed in this case. U. S. Cir. Ct., Iowa, Sept., 1881. *Davis v. Stewart*. Opinion by NELSON, D. J.

JONES V. MATTHEWS.

(3 Lea, 84.)

Negotiable instrument — witness — accommodation indorser to prove alteration.

In a suit against an accommodation indorser by an innocent holder the indorser is competent to prove a material alteration.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

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Thruston & Bradford, for Jones.

Smith, Baxter & Allison, for Matthews.

COOPER, J. Suit upon a note, brought by a person claiming to be an innocent holder for value before maturity against two accommodation indorsers. Verdict and judgment for defendants, and plaintiff appealed.

The note was one of a series of notes given for rent. The defense was that after the note had been indorsed by the defendants for the accommodation of the makers, it was materially altered by the insertion of the words, "to bear interest at the rate of ten per cent after maturity." The trial judge excluded the testimony of the maker of the note who delivered it to the original creditor, and who was offered as a witness by the defendants to prove that he made the alteration, after the note was indorsed by the defendants, in the presence and at the request of the creditor. But the judge admitted the defendants themselves to testify that when they indorsed the note, as they did for the accommodation of the makers, and delivered it to one of the makers, it did not contain any clause calling for interest, and that it was afterward altered by the insertion of the words quoted, without their knowledge, consent or authority. The note itself appears to have been a printed form, the last printed words being "value received." Immediately opposite, and on a line with these words, is the signature of the first maker of the note. The interest clause is commenced just above the words "value received," and continued on a line to the word "after" inclusive, which last word is so near to the signature of the maker as to leave no interval for any other writing. The word "maturity" of the interest clause is therefore carried down and written immediately after the printed words "value received."

The plaintiff objected to the admission of the testimony of the defendants, and the ruling of the court on the objection is now assigned as error. And the argument is, that upon grounds of public policy, the defendants as indorsers of the note were incompetent to invalidate it. The discussion resuscitates the famous cases of *Walton v. Shelley*, 1 T. R. 296, and *Jordaine v. Lushbrooke*, 7 id. 601, and revives the fierce, long-continued and often renewed struggles to which they gave rise. When Professor Greenleaf wrote his treatise on the law of evidence, while conceding that the ruling

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in *Jordaine v. Lashbrooke*, which overruled *Walton v. Shelley*, had been adhered to in England, he thought the weight of American authority was in favor of the earlier ruling, that a party to a negotiable paper is not competent to invalidate it. At the present day, the latest writer on negotiable securities thinks the better opinion to be that negotiable instruments enjoy no immunity from the general doctrine of evidence, and that any party to a written contract, negotiable or otherwise, is competent to testify as to its invalidity. 2 Dan. Neg. Inst., § 1217. The trial judge in this case with commendable impartiality, applied the doctrine of *Walton v. Shelley*, to the maker of the note, and the doctrine of *Jordaine v. Lashbrooke*, to the indorsers. It is only the last part of his ruling that comes before us for revision.

In this State, as elsewhere, the "battle of the books" has been fought several times, with varying success. In the earliest of our cases in which the question was raised, it was argued by three lawyers on each side, two of whom, Catron and Crabb, were afterward judges of this court, one of them becoming an associate justice of the Supreme Court of the United States. The case was decided by three able judges unanimously, two of them, HAYWOOD and WHYTE, writing concurring opinions. *Stump v. Napier*, 2 Yerg. 35. The court threw its weight decidedly in favor of the later ruling of the King's Bench. Both of the judges, who wrote opinions, comment on the maxim of the civil law, "*nemo allegans suam turpitudinem est audiendus*," with which Lord MANSFIELD sought to sustain his conclusion in *Walton v. Shelley*, and show that it has no application to witnesses, as does Mr. Justice FIELD more than half a century afterward, in *Davis v. Brown*, 94 U. S. 426. The same thing had been done in the still earlier case of *Townsend v. Bush*, 1 Conn. 260. The case of *Stump v. Napier*, was decided in January, 1821. In December, 1859, the point came before this court whether the admissions of a party to a note while in possession of it were admissible against an assignee after maturity. The admissions were held to be competent, and the eminent judge, happily still living, who delivered the opinion of the court, said: "But it is argued that it is a rule of law, founded on public policy, that no party who has signed or indorsed a negotiable paper shall ever be permitted to invalidate it, and that *a fortiori* it must be so as to his declarations. It is sufficient for us to say, the established rule is otherwise in our State." He cites the preceding case as

having established the rule. *Drennon v. Smith*, 3 Head, 389. In the intermediate time, and in different cases, two eminent judges of this court, one of them also happily still living, rather *arguendo* than by way of direct adjudication, express a decided opinion in favor of the doctrine of *Walton v. Shelley*, *Oliver v. Bank*, 11 Humph. 74 ; *Smithwick v. Anderson*, 2 Swan, 573. In neither of these cases does it appear that *Stump v. Napier* was called to the attention of the court.

A large majority of the highest courts of the States have adopted the later English rule, and have held the parties to the negotiable paper competent witnesses for all purposes. The Supreme Court of the United States has adhered to the earlier rule, although the original cause in which it was announced has been virtually overruled in the case cited above. In this war of giants, it behooves us to move cautiously, and taking warning from the past, to confine our decision to the case before us.

In *Walton v. Shelley*, the indorser of a promissory note was held to be inadmissible as a witness, on grounds of public policy, to prove the note void for usury in its inception. The text writers treat this decision, and the authorities which have followed it, as limiting the rule to cases where the witness is called to prove that the security was void in its creation, or at the time when the witness gave it currency. 1 Greenl. Ev., § 383 ; 2 Pars. Notes & Bills, 470. "And this," adds Greenleaf, "in the ordinary course of business, and without any mark or intimation to put the receiver on his guard." 1 Greenl. Ev., § 385 and note. An indorser may therefore prove any fact not going to the original infirmity of the security when indorsed by him. *Barker v. Prentiss*, 6 Mass. 430 ; *Buck v. Appleton*, 2 Shepl. 284 ; *Stone v. Vance*, 6 Ohio, 246. As for example, that the note had been paid after being put in circulation. *Greenough v. West*, 8 N. H. 400. Or that after he had indorsed and delivered the note to a third person to be presented to a bank for discount, the third person fraudulently put it into the hands of a broker. *Woodhull v. Holmes*, 10 Johns. 231. Or that the note had been fraudulently altered. *Parker v. Hanson*, 7 Mass. 470. If the alteration were of a character to indicate to a person of ordinary prudence that it was made after the execution of the note the purchaser would not be an innocent holder, and this point was left to the jury in the present case under a proper charge.

If therefore the note was altered by the insertion of the words

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calling for ten per cent interest after the defendants, as indorsers, had given it currency, the defendants would be competent to prove the fact. Excluding the testimony of the maker of the note, whose proof tended to show that the alteration was made by him at the time he delivered the note to his lessor or creditor, the evidence was to the effect that the alteration was made after the indorsement, and before the delivery to the creditor. And the trial judge charged that it was not material that the alteration should have been made before the note was delivered to the creditor, or at his instance. In other words, he instructed the jury that the alteration would discharge the indorsers, if made without their knowledge or consent after they had indorsed the note, and before the actual putting of the note into circulation. The inception or creation of the note as to the indorsers was when they put their names upon it for the accommodation of the makers. If there be any rule of public policy which closes their mouth as witnesses, it must be limited to an invalidity then existing. It could not extend beyond that date ; for, if so, they would be at the mercy of the maker, and estopped to show even a change in the amount of the note, provided it be so skillfully done as to escape ordinary observation. The estoppel, on the ground of public policy, can only relate to the note actually executed by the indorsers, not to another and a different note.

The allegation of the plea, that the alteration was made after the note had been “ signed, indorsed and delivered by the defendants,” may in this view be treated as the delivery by them to the maker, any thing further being considered as surplusage, his honor so expressly stating in his charge.

There is no error, and the judgment will be affirmed.

Judgment affirmed.

SUMMITT V. STATE.

(8 Lea, 418.)

Railway company — public regulation.

A regulation by a railway company forbidding hackmen, peddlers, expressmen and loafers from entering a passenger-room at the station is valid, but a hack man with a check for baggage may enter the baggage-room therefor.

CONVICTION of assault and battery. The opinion states the case.

T. W. Wrenne, for Summitt.

Attorney-General, Lea, for State.

FREEMAN, J. This is an indictment and conviction for an assault and battery, but presents a question of some interest, not ordinarily found in such cases. The defendant is a watchman with police powers, at the Nashville & Chattanooga Railroad Depot in the city of Nashville. That company has a regulation forbidding hackmen, peddlers, expressmen and loafers from coming within the depot building. Placards are posted in and about the depot announcing this fact. The proof however tends to show that a hackman who has a check for luggage of a passenger may enter the building for this purpose, and also that the prosecutor in this case, who was a hackman, had such a check, and exhibited it.

It was the duty of the defendant to see that the regulations of the company referred to were enforced.

The proof tends to show that defendant found prosecutor in the depot, probably at the room provided for passengers, endeavoring to induce a party to take his hack for the Louisville depot. It is claimed by the defendant's witnesses that prosecutor was doing this in a noisy manner. The defendant ordered him out of the depot, and on his refusal to go, forcibly ejected him from the building—some proof going to the fact that he struck him a blow with his walking stick. The defendant justifies his conduct by virtue of his authority to enforce the regulation referred to.

On this question his honor, the criminal judge, charged the jury substantially : That if the prosecutor had a check for the baggage of a passenger then in the depot, and it was one of the rules of the company that the possession of such a check entitled the party as a hackman to go into the depot for the baggage, then he would have the right to go into the depot for that purpose and remain a reasonable time. But that if from the evidence the prosecutor was in the passenger room and not where the baggage was, whether he was annoying a passenger or not, the defendant had the right, and it was his duty to request him to go out of that particular room, and if prosecutor refused after being so requested, the defendant

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had the right to use all necessary force to eject him from that room alone, and in this would not be guilty of an assault and battery. But he charged further : " That on this state of facts, defendant would only have the right to put the party out of that room, and should then have permitted him to have gone to the proper place for the baggage ; and if instead of doing this, he ejected him forcibly, not only from the sitting room, but from the depot building, and the prosecutor had lawful business in the depot, then defendant would be liable for this action."

It is settled law, that a railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly management of its depot and other buildings open to the public. These rules however must be reasonable, and such as do not unnecessarily infringe upon the rights of the public, and others having or carrying on business in connection with railroad traffic and travel.

We see nothing from the facts found in this case that renders the regulations of the company under consideration obnoxious to objection. We think however his honor, the criminal judge, gave a correct statement of the law on the facts before him. If it was (as is not seriously controverted), the right of a hackman under the regulations to go into the depot to obtain the baggage of a passenger whose check he has, then it could not be that he had forfeited this right, at the will of the watchman, as a penalty for departing from the strict line of his right, by going into the sitting room for passengers. In doing this, he was liable to be ordered out of this unauthorized place, and if necessary ejected from it. But it does not follow, that in the exercise of this right on the part of the watchman, he could go further and deprive the hackman of that which was his right, that is to procure the luggage for which he had a check. This is not to exercise a right on the part of the watchman, but to go beyond that and enforce a penalty, or forfeiture of another right, because of a violation of the rule of the company by a departure from his proper direction, or going into an unauthorized place temporarily.

All reasonable rules should be enforced and upheld by the law in favor of railroad companies ; but at the same time it is equally proper to restrict their agents and officials to the strict line of duty in carrying them out, in order to protect the public from arbitrary conduct on their part in the exercise of their legal rights. The

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watchman had the right to see that the proper regulation was not violated. When that violation was corrected, then the right of the other party to get the luggage was one of which he could not be deprived under the facts in this case — and such is the theory of his honor's charge. In this we think he was correct, and affirm the judgment.

Judgment affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY V. GARRETT.

(8 Lea, 438.)

Carrier — ejection of passenger for non-payment of fare — damages.

A railway passenger, who ignorantly and in good faith tenders a tax-certificate for his fare, may not be ejected as a trespasser, and if before ejection another person offers to pay his fare for him, the carrier must receive it and carry him ;* and if notwithstanding he ejects him, he is liable to punitive damages.

ACTION of damages for wrongful ejection from railway train. The opinion states the case. The plaintiff had judgment below.

Ed. Baxter and Smith & Allison, for Railroad Co.

Bate & Williams, for Garrett.

FREEMAN, J. This action is brought to recover damages for being “wrongfully, wantonly and maliciously ejected from defendant's cars, whereby the party was greatly injured,” etc., as appears by the first count of the declaration.

[Minor matter omitted.]

The real questions in the case however arise on the charge of his honor, the Circuit judge, on two propositions. First, as to the offer to pay the fare by a third party when demanded by the conductor, for which the plaintiff was put off the train; and second, on the subject of vindictive or punitive damages.

A brief summary of the facts will be sufficient to present these

* To same effect, *Bland v. So. Pac. R. Co.* (55 Cal. 570), 36 Am. Rep. 50.

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questions. About the 10th of August, 1871, plaintiff got on the train in Edgefield, near the city of Nashville, to go to Gallatin, in an adjoining county. He had no money, but had a certificate of payment of a tax to the Davidson county tax collector, of a tax levied for the benefit of the defendant railroad company. This tax certificate was for some cents more than the fare. The testimony is uncontradicted, and no suspicion thrown over its truthfulness, that the plaintiff in good faith believed this certificate would be received in payment of his fare. He had travelled over the Edgefield & Kentucky road and paid his fare with like certificates. He swears positively that he did not get on the cars with the purpose of making a case to test the question of the liability of the road to take such certificates, and his statements are corroborated by the fact that he was poor, had probably but this one certificate on the road, and was not likely to have been a man to have engaged in such litigation.

There was no ticket office where he got on the train, that he might have tested whether his certificate would be received before going on the train, but it was the customary point for passengers from Edgefield to get on trains.

After going over two miles the conductor came into the car where he was, collecting fare of passengers and taking up tickets. When he reached plaintiff he tendered him the tax certificate, which the conductor refused, saying to him he must pay \$1.10, the fare, or he would put him off the train. He told him he had no money and that he was sick, and urged him to take him to the next station, a few miles on, where he could get the money from friends and pay him. The conductor then took hold of him, either by the coat collar or arm, and walking rapidly with him along the car to the door — after ringing the bell to stop the train — as he opened the door a passenger, as he says, “from motives of humanity,” said to the conductor “let him go back, I will pay his fare.” The weight of the proof is that the conductor replied, it is too late, and passed on the platform, leading or having the plaintiff in front of him. As plaintiff got on the steps the train jerked and he fell off on some loose rocks, slightly hurting his hand and giving him something of a shock, though doing him no serious injury.

The plaintiff was upward of sixty years old and very feeble, while the conductor was a large, stout, robust man. We may assume the fact to be that the conductor heard the proposition of

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Williams to pay the fare, not only from the fact that witnesses say it was spoken loud enough to be heard over the car, and was so heard by several farther from the speaker than he was. It was addressed to him and therefore more likely to be heard by him. But what makes this a conclusive assumption is that he was present in court, summoned as a witness, and was not examined by defendant to contradict any statement of the facts as given by the plaintiff or his witnesses.

From this proof we gather, that the jury were warranted in finding that the plaintiff was rudely seized, though not roughly enough to injure him, and expelled from the cars by such force as we have indicated, when he had not in the slightest degree refused to get off, nor made any resistance to the act of the conductor, and in fact was totally unable to have done so. The weather was exceedingly warm and he must in his enfeebled condition have felt it keenly in walking back, as he was compelled to do, to his home.

On these facts we assume the party was properly on the cars, so far as his motives and good faith were concerned. Having been under a wrong impression as to the use of the certificate in paying his fare, he was bound to pay his fare, or at any rate unless this payment was made to the conductor, he might properly have been put off the train, and no liability would be incurred by so doing, provided it was done in a proper manner, and with no unnecessary rudeness, insult or injury. In other words, if the plaintiff got on the cars in good faith, in ignorance of the fact that his tax certificate would not pay his fare, with no intention to impose upon the carrier, he cannot be treated merely as a trespasser in thus getting on the car. Hutch. on Carriers, 459. But on failure or refusal, after request, with reasonable opportunity allowed to comply, to pay his fare, he might be ejected or put off the cars by the conductor.

The fact of a party getting on a passenger car for the purpose of travel, of itself creates by operation of law a contract, and the law defines the terms of the contract, the obligations of which bind both parties. On the part of the carrier, among other things, the party is entitled to be carried with the care required by law, at the established rates and with no unnecessary delay. On the part of the passenger, he is bound as the first duty to pay, or offer, or be willing to pay his fare according to such reasonable regulations as may be established by the company. Payment, when demanded, is his duty. The receipt of the compensation is the right of the carrier,

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and this is a condition precedent, without the performance of which he is not bound to perform the service.

Railroads, being public carriers, are bound to carry all who apply, against whom there is no legal objection. Hutch. on Carriers, § 538. This duty is imposed by law, upon payment or offer to pay the fare required, or properly due for the service. And it is said—and we think correctly—that if a party in good faith get on a car, in disregard or ignorance of a regulation requiring a ticket before getting on, if ready and willing to pay the price of his carriage when demanded, could not be ejected from the cars because of non-compliance with such regulation, but may demand to be carried to his destination upon an offer to pay according to the carrier's rates. Hutch. on Carriers, § 570. The principle is, the carrier is bound to carry, but is entitled to his pay—when this is offered, the law imposes the duty.

This being conceded, it seems to follow that his honor was correct when he told the jury substantially, that if another person offered to pay the fare before ejection from the car, the carrier was bound to receive it and transport the passenger. It is unimportant to the carrier from whom the money comes. If it is the proper amount, he gets what he is entitled to, and must perform the duty imposed. To require that the passenger shall pay his own money would be absurd. If another party offers to pay for him, it is precisely the same as if the party, finding himself without money to pay, had borrowed the amount from one near him and tendered it. The conductor would have the same right to refuse to accept money thus borrowed, as to refuse the offer made in this case. There can be no difference in principle in the cases.

To test this further, however, suppose a carrier should make a regulation that none but money from the pocket of the passenger himself should be received by conductors on passenger trains, and if money should be offered by a friend to pay a party's fare, it should be rejected, no one could hesitate to say such a regulation would be void as unreasonable, and beyond the power of the company to make. If such a rule could not be properly made, the act of a conductor in such a case, without a regulation to that effect, cannot be justified. For these reasons we think his honor did not err on this question in his instructions to the jury, and they were well warranted in finding the party wrongfully ejected, if they found such an offer was made, and was heard by the conductor as he

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passed to the door for the purpose of ejecting the plaintiff. Public policy, the interest and rights of the public, as well as the known conditions surrounding the business of carrying passengers by railroads in this country, demand that no narrow or technical rules should be prescribed to enable them to exercise any arbitrary authority whatever in the performance of their duties growing out of their relation to the public. On the other hand, every principle of fairness and of right demands that the carrier should be sustained in enforcing such reasonable regulations as may by experience be found necessary and proper in the conduct and management of the vast machinery to be administered in carrying on this complicated and responsible business.

It is urged, however, and cases are cited tending to support the position, that immediately on failure to comply with the demand of the conductor the contract was broken, or was forfeited, and the right of the carrier was complete to eject the passenger—regardless of a subsequent offer before actual ejection, to pay either by himself or another for him.

To this proposition we cannot assent, at any rate in a case like the present. Here was no captious objection or refusal to pay, or comply with a reasonable regulation of the carrier, such as the cases of refusal to give up ticket on receiving a check, or to exhibit ticket or the like as in the cases referred to. On the contrary it was only an inability to meet the demand for the fare arising out of innocent mistake or ignorance.

The rule contended for stands on too narrow a technical logic to meet the demands of right in such cases. A rule embodying a reasonable and liberal spirit, the one dictated by fairness, and the nature of the duties respectively imposed on the parties, should be laid down. The rule we have given we think embraces the true spirit of the whole contract and the rights of the parties on the subject. The passenger is entitled to transportation, the carrier to fare. When this is paid or offered, the law imposes the duty, and if offered by or for a passenger before his eviction from the car, then his right is fixed, and the duty of the carrier arises.

Ejection from the car is not in the nature of a forfeiture or penalty to be enforced by the conductor. It is simply the exercise of a legal right, that right to be exercised with due regard to the rights of others. The case of a party taking passage on cars, like the one before us, may well be likened to that of a party who is in

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another man's house, not having been guilty of a trespass in entering. In such a case the long-settled rule is, that he must be told to leave before he can be forcibly put out, and such a degree of force then only shall be used as is necessary to accomplish the object. 6 Wait Act. and Def. 121, citing *Weaver v. Bush*, 8 T. R. 78; *Scribner v. Beach*, 4 Denio, 448; and if wanton injury be inflicted even on a trespasser, he may maintain an action therefor. *Deane v. Clayton*, 7 Taunt. 489. And these rules apply to a railroad company; and a party may lawfully resist being put off the train with unnecessary rudeness or violence. 6 Wait Act. and Def. 122.

An extreme case, it may be, will put this in a light that will perhaps make it clearer. An old, feeble woman gets on the car, thinking she has the means of paying her fare, but finds herself mistaken. The law authorizes, and the regulations of the company require, that she shall be put off. But a gentleman sees her case, and after she had been started out of the car proposes to pay, out of motives of humanity. Could any one say that a carrier, with the obligations of his position, should not promptly receive his compensation and return her to her seat? The common sense of all would at once answer in the affirmative, and the moral sense of every man be shocked at the assertion of a contrary rule.

We do not decide on a case where there is a refusal to pay cap-tiously and vexatiously—we have no such case before us. But as applicable to the facts of this case we have no question his honor's charge was correct, and approve the principle announced.

The next question is, that his honor allowed the jury, if they thought proper, to give punitive damages or smart money in this case. We held upon full consideration, in the case of *Haley v. Mobile & Ohio Railroad Co.*, 7 Baxt. 243, that a railroad company was liable for vindictive damages in all cases where the elements required to give such damages were found, as in the case of natural persons. In that opinion by DEADERICK, C. J., we approved the principle of the case of *Goddard v. Grand Trunk Railroad Co.*, 57 Me. 202; cited from 2 Am. Rep. 39, in this language. "That there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than in the case of railroad corporations, in their capacity of common carriers of passengers." We see no reason to go over the cases in other States to find support for this view. It is sound in our judgment, and needs no further discussion.

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It is proper to say, that the case of *Nashville & Chattanooga Railroad v. Starnes*, 9 Heisk. 53, did not intend to announce any contrary general doctrine, and does not, when considered in connection with its facts. So far from limiting the liability of a railroad company, for the acts of its servants, when an injury is done in the performance of the duties of their positions, it was extended in that case to the act of the servant, in wantonly and for mischievous purposes using the engine of the company to alarm horses in a wagon—(a proposition the writer of this opinion thinks a very doubtful one). In a case like that however it was said the company should not be held liable for vindictive damages, because, says the judge: “The act complained of was manifestly done without the defendant’s knowledge or consent, and was the willful and unauthorized act of the servant alone.” Whether this be correct or not in reference to the facts of that case we need not now determine, but it has no application whatever to the case before us, where the act done was in the strict line of the duty of the conductor—but done under a state of facts not justifying the act done, and in a wrongful and perhaps careless manner, to the injury of plaintiff.

We need not discuss the question of general liability of corporations for the acts of their agents for wrongs done in the performance of their functions. As said by this court in the case of *Nashville & Chattanooga Railroad Co. v. Elliott*, 1 Cold. 614: “In general the only mode in which a corporation aggregate can act is through the intervention of their agents,” etc. This however is all familiar law that at this day needs no support from authority.

As to the amount of damages in this case, we need only say, it is a matter largely left by the law to the discretion of the jury—and we see nothing in the sum allowed in this case, \$2,000, which would authorize or require a reversal on this account.

[Omitting minor matters.]

Let the judgment be affirmed.

Judgment affirmed.

AMERICAN CENTRAL INSURANCE COMPANY v. MCCREA.

(8 Lea, 513.)

Insurance — condition — waiver — knowledge of general agent.

A fire insurance policy on a distillery provided that it should be void if the distillery should be run at night. It always had been and continued to be run at night, to the knowledge of the general agent who delivered the policy. *Held*, a waiver.

A fire insurance policy provided that it should be void in case of other insurance without written consent on the policy, and that the use of general terms or any thing less than a distinct specific agreement, clearly expressed and indorsed on the policy, should not be a waiver of any condition. There was other subsequent insurance, notified to the general agent, who assented, but postponed indorsing consent for his own convenience. *Held*, as waiver.

ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

Demoss & Malone, R. McPhail Smith and E. H. East, for Insurance Co.

Smith & Allison and Ed. Baxter, for McCrea.

COOPER, J. The American Central Insurance Company has appealed in error from a judgment recovered against it by McCrea, Maury & Co. on one of its policies insuring against loss by fire.

McCrea, Maury & Co. were distillers at Nashville, having a large stock of liquors, and valuable machinery in the building in which the business was carried on and the liquors stored. The building, stock and machinery were destroyed by fire on January 28, 1873. McCrea, Maury & Co. held, claimed and sued upon the following policies, of the following insurance companies, issued at the times and for the amounts specified.

[Omitting statement.]

The policy of the American Central was issued May 15, 1872, for one year, in the sum of \$5,000, one-half on the stock of liquors, and one-half on the machinery, with the privilege of \$10,000 additional insurance. It contained the following provision: "If the assured shall have, or shall hereafter make any other insurance on the prop-

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erty hereby insured, or any part thereof, without the consent of the company written hereon; or if the above mentioned premises shall be occupied or used so as to increase the risk, or the risk be increased by any means whatever within the control of the assured, without the assent of the company indorsed hereon; or if a manufacturing establishment, running at night, then in every such case the policy shall be void." It also contained this condition: "The use of general terms, or any thing less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." It further provided, "This insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

The insurance on the property was after the issuance of this policy increased, as we have seen, to \$35,009. There was proof also tending to show that in the months of October, November and December, 1872, the building in which the stock and machinery were located was changed so as to increase the risk. It was admitted moreover that the distillery had always been run at night, and was so run before, at the time of, and after the issuance of the defendant's policy. No indorsement of the consent of the company to take the additional insurance, change of risk, or running at night had ever been made upon the policy. The policy was however issued at the same time with the policies of the Liverpool, London and Globe and the Franklin companies, and by the same agents, Peck & Cahill, who were the agents of all three of the companies, these companies being foreign corporations. The defendant, the American Central, was a corporation chartered by the State of Missouri, and having its principal place of business at St. Louis. It was doing business in this State under our insurance laws, through Peck & Cahill as their agents, under a power of attorney which appointed the "agents and attorneys of the said company to countersign and issue the policies of the company, and otherwise to do and perform the customary acts and duties of insurance agents."

During the year 1872, and probably before the issuance of the policies of May 15, 1872, although the fact does not distinctly appear, McCrea, Maury & Co. had taken out policies of insurance on their stock to the extent of \$5,000, through other agents, in the

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Ætna and Queen's companies, one-half the amount in each. These companies declined to continue the risks after the changes made by the insured in the building in the latter part of the year, and at the instance of the agents of these companies, the policy of the Louisiana Mutual was taken out on January 14, 1873, for the same amount on the stock alone. Peck & Cahill knew of the original insurance for this sum, although they seem to have thought that it was exclusively in the Ætna. They did not know of the policy of the Louisiana Mutual until after the fire. At their solicitation, they were authorized by McCrea, Maury & Co., early in January, 1873, to place \$15,000 more of insurance on the property, and undertook to do so with the knowledge that if effected the entire insurance would be \$35,000. Under this authority, Peck & Cahill did obtain the additional insurance in the Royal, the Boatman, the Citizens and the Equitable companies, in all \$15,000. These policies were received by them before the fire, but were not delivered to McCrea, Maury & Co. until after the fire. The premiums were paid and received after the fire. Peck & Cahill procured the policies of the Boatman and Citizens companies through the secretary of the American Central, by letter which gave such information that those companies wrote their policies so as to give the privilege of \$25,000 additional insurance. The Central company itself seems to have had no notice of the increase of risk in the building, nor of the other insurance of the 7th, 10th and 14th of January, except the notice implied from the foregoing facts.

No indorsement of the additional insurance was made upon the policy of the American Central. There is proof however, that Peck & Cahill, a week or two before the fire, requested McCrea, the active member of McCrea, Maury & Co., to bring up the policies held by the firm to be indorsed with the additional insurance, and that only a few days before the fire McCrea proposed, at the office of Peck & Cahill, to go after the policies for the purpose of having the indorsements made on them, and was requested not to do so because of some repairs then being made in the office.

Each of the other policies of January 7th, and the two policies of the 10th and 14th of January, contained the same provisions as those of the American Central policy touching over-insurance, increase of risk, running at night and waiver of conditions. No indorsement was made on any of them of the consent of the company to the previous or subsequent insurance as the case may be.

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The records of the suits on the Boatman and Citizen's policies, introduced in evidence, show that they were avoided on the ground of over-insurance.

It seems to be well settled that when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition or its breach will be considered as waived, because otherwise it would be an unmeaning form, the only effect of which would be to deceive and defraud. Where therefore a policy of insurance on a house provided on its face that if the building insured was on leased land the fact must be expressed in writing in the policy, and the house was on leased property and the fact not so expressed, the truth being known to the agent of the company issuing the policy, the court felt itself constrained "by the force of authority" to hold that the condition was waived. *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434. So where the policy contained a condition that it should be void if refined, coal or earth oils were used on the premises, and the agent had inspected the premises and knew that kerosene oil was used for lighting them: *Bennett v. North British, etc., Ins. Co.*, 81 N. Y. 273; s. c., 37 Am. Rep. 501. So, of the condition that the policy should be countersigned by the local agents. *Myers v. Life Ins. Co.*, 27 Penn. St. 268; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241. So, of the condition that a memorandum of prior insurances should be made on the policy. *Crane v. National Ins. Co.*, 16 Md. 269. So, of the customary clause in a policy that it will not be binding until the premium is paid in fact. *Eagan v. Aetna Fire Ins. Co.*, 10 W. Va. 583; *Trustees, etc., v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Murphy v. Southern Life Ins. Co.*, 3 Baxt. 440. In view of the law as thus settled, no point seems to have been made in the court below or is made in this court, upon the fact that the distillery of the assured was run at night. It had always been so run, and the fact was well known to the general agents of the insurer.

The defense is rested upon the over-insurance and the increase in the risk by the change of the building after the issuance of the policy.

The policy of the American Central allowed additional insurance to the amount of \$10,000, and to that extent furnished its own rule of construction as to the definiteness meant to be required in the consent to future insurance: *Westchester Fire Ins. Co. v. Earle*, 33

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Mich. 144; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137. It is not contended that the additional insurance thus allowed required any further consent, or any indorsement on the policy. The amount allowed was covered by the other two policies issued on the same day. The insurance in the *Ætna* and *Queen*, whether obtained before or afterward, and the insurance afterward obtained in the other companies mentioned, were in excess of the amount allowed and were never indorsed on the policy. Nor was the increase in the risk, if the risk was increased by the change in the buildings, ever sanctioned by an indorsement of the consent of the company on the policy. The answer made to these defenses is that the conditions were waived by the knowledge of the agents of the company of the facts upon which they rest, or as it may be otherwise expressed, the company is estopped by the facts to make the defenses.

[Minor matter omitted.]

“What acts or declarations,” say the learned editors of the *American Leading Cases*, “will operate as a waiver of the warranties or conditions, which play a large and important part in most modern policies of insurance on life or against fire, is a question about which the authorities differ too much to be easily reduced to order and method. For while the courts have been desirous on the one hand to carry out the general purpose of the contract as one of indemnity, they have been fettered on the other by stipulations introduced as safeguards against fraud or malpractice, and the conflict has arisen between the general design and the incongruity or unfitness of the means employed, which has at all periods formed one of the difficulties of the law.” 2 *Am. Lead Cas.* 911. (5th ed.). The struggle on the part of the courts has been to protect the innocent policy holder from the literal operation of conditions designed for one purpose and used for another. Each new decision has been met by a new condition, and the struggle is recommenced. Perhaps it would have been better to have left the parties to make their own contracts in this as in other cases, subject to the ordinary rules of interpretation. For after all the insurance companies depend upon popular favor for support, and if their contracts had been found too rigid to attain this end, they themselves would have simplified them, instead of, as now, exercising their utmost ingenuity to increase their complexity. Our duty is however to administer the law as we find it.

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The policy in suit undertakes to provide that the consent of the company to additional insurance over the amount allowed, and to any increase of risk, shall be indorsed on the policy, and that this condition shall not be waived except by a specific agreement, clearly expressed and indorsed on the policy. It was at first held by the courts, when these requirements were inserted in policies, to be essential that these requirements should be literally complied with, and that any thing short of the prescribed formalities would work a forfeiture. But the weight of authority is now that if notice be duly given to the company, or its agent, of the additional insurance or increased risk, and no objection is made, the company will be estopped to insist upon a forfeiture of the policy because their consent was not indorsed, as literally required by the stipulation. The authorities *pro* and *con* are collected in May on Ins., §§ 369, 370 ; 2 Am. Lead. Cas. 911 ; Wood on Ins., §§ 496, 497.

The reasoning by which the later conclusion is reached may be briefly epitomized. In the first place, the contract of insurance is not within the statute of frauds, and may be by parol. *Commercial Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318 ; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574. The policy may therefore be renewed by parol, and from year to year : *Sanborn v. Fireman Ins. Co.*, 16 Gray, 448 ; *Post v. Aetna Ins. Co.*, 43 Barb. 351. The policy may be thus renewed after the property insured has been sold contrary to its terms, and the interest of the assured turned into that of a mortgagee. *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415 ; s. c., 32 Am. Rep. 330. The contract may be made retrospective by parol. *Security Fire Ins. Co. v. Kentucky M. & F. Ins. Co.*, 7 Bush, 81 ; s. c., 3 Am. Rep. 301. It seems to follow that a parol permission may equally be given, although the terms of the policy require the permission to be indorsed on the policy. *N. W. Iron Co. v. Aetna Fire Ins. Co.*, 26 Wis. 78. Or a forfeiture waived by parol. *Warren v. Ocean Ins. Co.*, 16 Me. 439. And *a fortiori*, where there is an understanding that the indorsement shall be made. *Rathbone v. City Ins. Co.*, 31 Conn. 193.

A written contract may be changed by parol, and this although it stipulate that it shall only be changed in writing, for the obvious reason that men cannot tie their hands or bind their wills so as to disable them from making any contract allowed by law, and in any mode in which it may be entered into. *Pechner v. Phoenix Co.*, 65 N. Y. 195 ; *Ins. Co. v. Wilkinson*, 13 Wall. 222. "A written bar-

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gain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." Per CAMPBELL, J., in *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 153. See to the same effect *Ins. Co. v. Norton*, 96 U. S. 234.

A contract, express or implied, founded upon sufficient consideration, even though it be only by way of injury to one of the parties, would fall within these principles. And the cases go to the extent of holding that if the agent be authorized to do the act required by the condition, he may bind the company by his parol waiver. For it is in the nature of a condition precedent to be subject to waiver, and that may be either oral or in writing. *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 25. In this connection it may be noticed that the decisions have transferred to the courts of law in this class of cases the equitable doctrine of estoppel, where a parol license or assent has been given in place of a license or assent in writing as required by the power under which the party acts. *Planters' Ins. Co. v. Myers*, 55 Miss. 47 ; s. c., 30 Am. Rep. 521. Thus where property has been given by will upon condition that the grantee marry with the written consent of the trustee, executor or other person named, a parol assent has been held good to vest the title. Per DWIGHT, Com., in *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195, citing *Lord Strange v. Smith*, Amb. 263 ; *Worthington v. Evans*, 1 S. & S. 165. So in case of leases requiring assent in writing to sub-letting, or alteration. *Macher v. Foundling Hospital*, 1 V. & B. 188 ; *Richardson v. Evans*, 3 Mad. 218. And the waiver of a forfeiture under a policy has been likened to a waiver of a forfeiture under a lease. Per Mr. Justice BRADLEY in *Ins. Co. v. Norton*, 96 U. S. 242, citing *Doe v. Meux*, 4 B. & C. 606 ; *Doe v. Birch*, 1 M. & W. 402 ; *Ward v. Day*, 4 B. & S. 337. The doctrine of waiver, it has been well said, to avoid the enforcement of conditions in a policy, is only another name for the doctrine of estoppel. *Globe Mutual Life Ins. Co. v. Wolff*, 95 U. S. 326. There should be, to constitute a waiver of the forfeiture of a policy, either a contract supported by a consideration, or the necessary elements of an estoppel. *Mason's Ben. Soc. v. Baldwin*, 5 Rep. 648 ; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 164. In the latest case in New York it is said that a waiver need not be based upon any new agreement or an

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estoppel. *Titus v. Glen's Fall Ins. Co.*, 81 N. Y. 410. And see *Viele v. Germania Ins. Co.*, 26 Iowa, 9 ; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

In the case before us it is clear that Peck & Cahill, the agents of the American Central Company, knew of the change in the building in which the business of the assured was carried on, and did not think the change increased the risk. For they not only allowed this risk to stand, but procured additional insurance at the same rate of premium. Two of the policies covering the additional insurance were obtained through the secretary of the Central American Company, and by letters which contained the information that the insurance was intended to be raised to \$30,000. These agents were also aware of the outside insurance which was first in the *Ætna* and *Queen*, and afterward in the *Louisiana Mutual*. The proof leaves no doubt that these agents intended to enter the proper indorsements on the policies in relation to the additional insurance, and that the indorsement was not made before the fire, because of their own request, and to suit their own convenience. It is equally clear that McCrea, Maury & Co. acted under the belief, induced by these agents, that the policy in suit was in force for their protection. Under these circumstances, the jury, under a proper charge, would have been warranted in finding that there was a waiver of the condition, or the forfeiture, if the agents had authority to make the contract or waiver.

The policy in suit was countersigned by Peck & Cahill as the agents of the American Central Company, under a power in writing which authorized them to countersign and issue the policies of the company, "and otherwise to do and perform the customary acts and duties of insurance agents." There is testimony in the record tending to show that it was their duty as agents to make the indorsement on the policy of the assent of the company to the additional insurance and change of risk. The insured were expected to deal with them in all matters touching the policy. Such an agency has been held to be sufficient to authorize the agent to waive the conditions in question, or the forfeiture occasioned by the failure to literally comply with them, and to bind the company by their acts in that regard in the way of equitable estoppel. *White v. Conn. F. Ins. Co.*, 120 Mass. 330 ; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 207 ; *Ins. Co. v. Wilkinson*, 13 Wall. 222 ; *Westchester Ins. Co. v. Earle*, 33 Mich. 143. And the objection to the want of knowl-

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edge of the transfer of the insurance on the stock in the *Ætna* and *Queen* companies to the *Louisiana Mutual* would be purely technical, such additional insurance having been known and acquiesced in. *Collins v. Farmville Ins. Co.*, 79 N. C. 279; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 26; *Baptist Society v. Hillsborough, etc., Ins. Co.*, 19 N. H. 550. The expressed willingness of the agents to make the proper indorsements of the insurance on the policy in suit, and the failure to do so occasioned by their own request, would make out a waiver or estoppel within the rule. Upon a proper charge, the jury might therefore have found that the agents of the company were authorized to waive the conditions on the forfeiture for non-compliance.

The only question left is whether the charge of the court was substantially correct within the principles thus established. The charge is open to objection as to the order in which it presents the law to the jury. For his honor, the trial judge, first delivered a written charge, the substance of which was that notwithstanding the conditions of the policy in reference to over-insurance and increase of risk, the conditions might be waived by the agents if they had authority so to do, and that the jury might look to the power of attorney under which they acted, in connection with the policy and the other testimony, to ascertain their authority. He also charged that the company might waive the conditions or the forfeiture, with full knowledge of the facts, and that the jury might look to the conduct of the company, and of its agent sent out to investigate the case and adjust the loss, if he communicated the facts to the company, to determine whether there was any such waiver. Afterward, upon request of the company, for certain special instructions, he charged all of the propositions as requested, "to be taken in connection with his written charge upon the subject of waiver and notification as therein expressed." The original charge and propositions are not in conflict, as argued by the counsel of the defendant, but they were presented in reversed order. In effect, his honor says, that if the policies taken out subsequently to the policy in suit were issued without the knowledge of the company sued, or its agents, they would, being *prima facie* valid, constitute over-insurance, and render the policy in suit voidable, unless the condition was waived as explained in the charge.

But we are constrained to reverse the judgment upon other parts of the charge. His honor instructed the jury that the only object

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of the clause of double insurance was to guard against the over-insurance of property, and the consequent temptation to crime. And if the loss in this case far exceeded the amount of the insurance of all the policies, the temptation guarded against never existed. This was clearly erroneous. A positive stipulation of a contract cannot be dispensed with, merely because the jury may think, upon the proof on trial, that the supposed object of the stipulation was otherwise attained. That would be for the court and jury to make a contract for the parties, instead of enforcing the contract made.

The charge blends together two entirely different questions, the power of the insurance company to waive a condition of the policy or a forfeiture, and the power of the agent. There can be no doubt of the power of the company. The doubt was as to the authority of the agent, and this point should have been clearly presented to the jury separate from the other. The judge said to them: "If the company, on being informed of all the facts touching a violation of the conditions and loss by fire, appointed an adjuster to ascertain the loss, and settle the amount of the same, without objection as to a breach of any of the conditions, you should look to such facts, in connection with the action of the agent, upon the question of a waiver of such assent being indorsed on the policy, and give them such weight, with all the facts found, as they may be entitled to." Undoubtedly these facts would have supplied any defect of authority on the part of the agent, but there was no evidence introduced to justify their submission to the jury in connection with the question of the agent's authority. There is no distinct and separate enunciation of the law on the point of the agent's power in the premises.

Reverse and remand for a new trial.

ROYAL INSURANCE COMPANY v. MCCREA.

(8 Lea, 581.)

Insurance — subsequent

A policy of insurance, conditioned to be void in case of other insurance, above a certain sum, without written consent, is avoided by subsequent valid insurance above that sum not consented to, although such subsequent insurance also avoided certain other insurance contemporaneous with the policy in question, and thus brought the amount of insurance within the amount allowed by that policy.

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ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

Demoss & Malone, R. McPhail Smith and E. H. East, for Insurance Co.

Smith & Allison and Ed. Baxter, for McCrea, Maury & Co.

COOPER, J. Appeal in error by the Royal Insurance Company from a judgment recovered by McCrea, Maury & Co., on policy No. 4, in the list of policies given in the case of the American Central Company just decided* and for the same loss.

The principal defense, both in this court and the court below, was that of over-insurance, upon substantially the same proof as in the foregoing case, of the policies issued, their dates and amount, and proceedings had thereon. The reply to this defense was not the same as in the previous case, for although the policy was obtained by the assured through Peck & Cahill, these persons were not the agents of the Royal Insurance Company, and only acted as insurance brokers. A broker, who effects insurance under no employment by the insurer, but for a commission upon the premium received for such risks as he procures to be offered and the insurer chooses to accept, is not the agent of the insurer in such a sense as to bind the insurer by notice to the agent. *Devens v. Mechanics & Tr. Co.*, 83 N. Y. 168. The effort therefore was to show that there was no over-insurance. For this purpose, transcripts of the suits of McCrea, Maury & Co., against the Boatman and Citizen's companies were introduced in evidence, showing judgment in favor of the company, and the argument made that it thence conclusively appeared that those policies were voidable at the time of the loss. The policy of the Royal company was for \$5,000, with the privilege of \$25,000 additional insurance, and required notice of previous or subsequent insurance, and the indorsement of a memorandum thereof on the policy, under the penalty that the assured would not otherwise be entitled to any benefit under the policy. For the reason given in the preceding case, there would be no violation of the condition so long as the additional insurance was within the amount allowed. See also, *Blake v. Exchange Mut. Ins. Co.*, 12 Gray, 265; *Benedict v. Ocean Ins. Co.*, 1 Daly, 8.

* *Ante*, 647.

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The policy sued on was not affected therefore by the other policies of the 7th and 10th of January, for these policies only carried the insurance up to \$30,000. Nor were the other policies of those dates thus far vitiated by over-insurance, for they were all issued with the privilege of the same amount of additional insurance. And the insurance of the *Ætna* and *Queen* had been avoided by the change in the building. All of the policies of these dates were *prima facie* valid. It was the over-insurance of the *Louisiana Mutual* of the 14th of January, that raised the question, and that insurance, if valid, would operate equally on each of the previous policies, all of them containing substantially the same provision as to notice of other insurance, and indorsement thereof on the policy. The policy of the *Louisiana Mutual* was not affected by over-insurance, for as we have seen, it was on the stock only and allowed \$15,000 additional insurance thereon, and the total insurance on stock did not exceed \$20,000. And the recovery of judgment thereon by the assured showed that there was no ground of invalidity.

In this view, the insurance, after the issuance of the policy of the *Louisiana Mutual*, exceeded the amount allowed by the policy sued on, and the excess was not brought to the notice of the defendant, nor of course indorsed on its policy. The condition of the policy was therefore violated. *Kennedy v. Ætna Ins. Co.*, 6 Ins. L. J. 359, opinion of this court. The plaintiffs sought to avoid the result by insisting that \$5,000 of the intermediate insurance were not real indemnity, because the policies, those of the *Boatman* and *Citizen's* companies, had actually been held to be invalid. The trial judge took this view, and charged the jury as follows: "The fact of having these policies (the *Boatman* and *Citizens*), and suing on them, would not of itself bar the plaintiffs of their right of showing that these policies were really not valid and binding. If you find from the proof, that these policies were sued upon and judgment rendered in favor of the companies, and that these judgments were still in force and not appealed from, and that the litigation for said sums is ended, the presumption would be that they were subject to a valid legal defense, and hence not valid insurance. If you find that these policies, amounting to \$5,000, were not a valid insurance, and that the plaintiffs had no more than \$30,000 insurance at the time of the fire, then you will find for the plaintiffs, so far as the sixth stipulation (the stipulation of the policy touching other insurance), is concerned."

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It is important to the insurer to know the amount of the insurance upon the property insured against loss by fire, in order to properly estimate the risk, because the greater the amount of the insurance, the less the inducement on the part of the assured to watchfulness against loss, and the greater the temptation to destroy the property. And it is obvious that the interest to know the fact of other insurance is the same whether it exist at the time of entering into the contract, or is procured afterward. The general doctrine that a previous or subsequent insurance without notice, under a policy requiring notice upon pain of forfeiture, discharges the insurers from any obligation to pay for a loss happening under such circumstances, is well settled, and universally recognized. The provision of the policy on this subject is one not regarded with the jealousy due to other provisions which work forfeitures, but is upheld without reluctance as a fair and just provision for a reasonable and proper purpose. May on Ins., § 364.

But what is an over-insurance within the meaning of the condition is one of the vexed questions of law about which the authorities are hopelessly in conflict. It was held in one of the earlier cases, that a prior insurance was not less within the condition because it was vitiated by the misrepresentation of a material fact, and therefore voidable at the election of the insurer. *Carpenter v. Washington Ins. Co.*, 16 Pet. 495. And the rule has been recently applied in favor of a subsequent insurer, although the prior policy contained the same condition, and was itself voidable, at the election of the insurer, because of the subsequent insurance. *Landers v. Watertown Fire Ins. Co.*, 86 N. Y. 414 ; s. c., 40 Am. Rep. 554. That court had already held that the prior insurer might insist upon a subsequent insurance as being within the condition, although the later policy itself contained a similar condition. *Bigler v. New York Ins. Co.*, 22 N. Y. 402. The reason for these decisions is, that the policy relied on as falling within the condition against other insurance of the policy sued on, was valid when issued, and although voidable by the insurer, the condition might be waived, whereby the very evil would arise which the condition in the policy sued on was intended to obviate. And therefore some courts broadly hold that subsequent insurance works a forfeiture of the prior policy whether legally enforceable or not. *Allen v. Merchants' Mut. Ins. Co.*, 30 La. Ann. 1386 ; s. c., 31 Am. Rep. 243 ; *Suggs v. Liverpool, etc., Ins. Co.*, 9 Ins. L. J. 657 ; *Ramsey*

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Manf. Co. v. Mutual Fire Ins. Co., 11 U. C. 516; *Jacobs v. Equitable Ins. Co.*, 19 id. 259. If the ground of invalidity of the subsequent policy has been waived, it would fall within the condition of the prior policy. *David v. Hartford Ins. Co.*, 13 Iowa, 69; *Bigler v. New York Ins. Co.*, 22 N. Y. 402; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. St. 403; *Jacobs v. Equitable Ins. Co.*, 19 U. C. 250. The weight of American authority seems however to be that the additional insurance, whether prior or subsequent, which will fall within the condition, must be valid. The cases are given in May on Ins., § 365, note, and 25 Alb. L. J. 3. The rule was followed by the Supreme Court of Virginia in a case in which the plaintiff, the assured, admitted the invalidity of the second policy under the condition against other insurance, and offered to cancel it in court. *Sutherland v. Old Dominion Ins. Co.*, 31 Gratt. 176. Other courts have carried the ruling to its logical result, and enforced the prior policy, although the subsequent policy had been paid or compromised, the condition being waived. *Thomas v. Ins. Co.*, 119 Mass. 121; s. c., 20 Am. Rep. 317; *Jackson v. Farmers' Mut. Ins. Co.*, 5 Gray, 52; *Lindley v. Union Ins. Co.*, 65 Me. 368; s. c., 20 Am. Rep. 701; *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664; s. c., 20 Am. Rep. 778. For say these courts, if the prior policy be good when issued, it cannot be invalidated by the subsequent acts of the other parties in treating the latter voidable insurance as valid. And the Supreme Court of Ohio can see no distinction between a policy voidable on its face, or voidable for extrinsic matter. The subsequent insurance, say the court, is either valid or void, and in either view, the question is, was it insurance? "The rights of the parties under the policy sued on, the prior policy, became fixed at the time the loss occurred, and could not be affected by what was subsequently done between the assured and third parties." *Insurance Co. v. Holt*, 35 Ohio St. 189; s. c., 35 Am. Rep. 601.

"The decisions," say the editors of the American Leading Cases, "avoid the hardship of pronouncing the insurance void in consequence of the failure to give notice of another which is equally invalid, and thus leaving the assured without a remedy on either policy, but are perhaps open to the more serious objection of enabling the owner of a house to insure it for its full value at two different offices, and keep each set of insurers in ignorance of the contract with others without the risk of loss if the secret is dis-

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covered, and with the certainty of gain if it remains concealed." 2 Am. Lead. Cas. 899. These decisions did not meet the approval of this court when the cases were here before. It was then held that if the policies of insurance offered in evidence to show that the defendants in error, the assured, had violated the terms of the policies sued on, and thereby forfeited their rights of recovery, were valid on their face and binding between the parties at the time of issuance, no subsequent acts by the parties thereto, without the knowledge and consent of the plaintiffs in error, the insurance companies, would defeat their right to claim any forfeiture accruing to them by reason of the making and acceptance of such policies in violation of the conditions of those sued on. In other words, applying the language to the facts, if the Boatman and Citizen's policies were valid on their face, and binding between the parties at the time of issuance, as they undoubtedly were, and the policy of the Royal company was avoided by the subsequent over insurance of the Louisiana Mutual, the forfeiture which thereby accrued to the Royal company could not be defeated by the result of any suit brought by the assured on any of these policies. The charge of the trial judge was in conflict with this ruling, and therefore erroneous.

The charge is erroneous for another reason. It ignores the ground upon which, as shown by the transcripts introduced in evidence, the two suits brought by McCrea, Maury & Co., against the Boatman and Citizen's companies, were decided in favor of the companies. One grave objection to the current of American authority on this subject is, that to restrict the condition in question to valid insurance, lets into the suit on one policy a wilderness of questions, touching, it may be, many other policies not sued on, involves the suit in a maze of complexity, and leads to the anomaly of passing, in a suit on one policy, upon other policies, themselves the subject of separate suits. But if these questions are gone into, undoubtedly they can influence the result of the pending suit only so far as the facts will warrant. And if the facts have already been determined in a separate suit on any particular policy, these facts must of course be looked to. Now the records of the two suits show that each of the two companies sued expressly admitted, in its answer to the declaration of the plaintiffs, that it had issued to the plaintiffs the policy sued on, and that it put its defense upon the ground of subsequent over-insurance, which issue, upon a charge of the court on

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that very point, was found in favor of the company. If it be conceded then that in this suit the validity of the other two policies may be tested, it clearly appears that they were valid when issued, and were avoided by the over-insurance created by the issuance of the policy of the Louisiana Mutual. But the issuance of this policy was equally a violation of the same condition of the Royal policy now in suit. Upon what principle can the over-insurance be held to vitiate those two policies, and not to vitiate the present policy which was first in point of time? It cannot be that the right to relief on that ground shall be made to depend on which suit is first tried. If this suit had come on for trial before the other two suits, and the same facts had been introduced in evidence, would not the present defendant have been held entitled to relief for the violation of the condition of its policy? The fact that other companies have successfully relied on the same defense, cannot affect its right. The over-insurance, without notice, was a release of all other companies, the conditions of whose prior policies were violated, so far as the question of forfeiture was concerned. The rights of the parties to this extent must turn upon the validity of the policies on their face at the time of the issuance of the policy creating the over-insurance as to the particular policy sued on. Those rights cannot be made to turn upon the voidability of those policies, or the result of suits or compromises between the parties.

No question was made in this case in the court below upon the invalidity of the policies of the Boatman and Citizen's companies for the failure to prepay the premiums. And if the point had been made, it would have been set at rest by the record of the suits on the policies.

The judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed.

SOMERFIELD V. STATE INSURANCE COMPANY.

(8 Lea, 547.)

Insurance — subsequent

A policy of insurance, conditioned to be void for other insurance without consent, is avoided by a subsequent policy not consented to, although containing the like condition.

Somerfield v. State Insurance Company.

ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

R. McPhail Smith, for plaintiff in error.

J. C. Bradford, for defendant in error.

COOPER, J. Somerfield sued the State Insurance Company on a policy of insurance against loss by fire. The suit was successfully defended and the plaintiff appealed in error.

On February 26, 1877, the State Insurance Company issued to the plaintiff Somerfield a policy of insurance in the sum of \$400 on his stock of goods in a certain store, insuring the stock against loss by fire for one year. The policy contained this condition: "If the assured shall have, or shall hereafter obtain any additional insurance on the property hereby insured or any part thereof, without the consent of this company indorsed hereon, the policy shall be void." On October 13, 1877, the plaintiff procured from the German American Insurance Company another policy of insurance on the same stock for \$500, insuring against loss by fire for one year, of which no notice was given to the State Insurance Company. The policy of the German American contained this condition: "If the assured shall have, or shall hereafter make any other contract of insurance, whether valid or not, on the property hereby insured or any part thereof, without the consent of this company written thereon, the policy shall become void." On December 20, 1877, the property insured was destroyed by fire.

The trial judge held that the second policy constituted over-insurance within the meaning of the condition of the policy sued on, although the second policy was itself subject to be avoided by the existence of the first policy, of which the German American company was shown to have had no notice. Error is assigned on this ruling.

This case does squarely raise the question sought to be raised, and which was considered in the case of the *Royal Insurance Company v. McCrea*, 8 Lea, 531.* The question was not directly presented in that case, or in the other cases connected therewith, in all of which opinions have been this day delivered, because the

* *Ante*, 656.

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over-insurance relied on in those cases was occasioned by the taking out of a policy neither void nor voidable for that or any other reason. There was therefore valid over-insurance as to all the policies sued on in violation of substantially the same condition in each, and the question upon that state of facts was what effect the avoiding of some of these policies by the over-insurance would have upon the other policies equally avoidable by the same insurance. In the suit now before us, the second policy is avoided by the existence of the first policy without notice, and the first policy is equally avoided by the existence of the second policy without notice, if the ruling of the trial judge is correct.

We found in the case of the Royal Insurance Company that the authorities on the subject under consideration were hopelessly in conflict, and that what appeared to be the current of those authorities had not met the approval of this court when the question was before it at a previous term. We now find from the form of the condition of the policy of the German American Insurance Company, that the insurance companies are themselves meeting the current of authority by providing that the other insurance shall be fatal "whether valid or not." And the learned counsel of the plaintiff argues that the State Insurance Company must go and do likewise before it can resist the current. But it seems to have been intimated by one court that such a clause is itself void. *Gee v. Ins. Co.*, 55 N. H. 65; s. c., 20 Am. Rep. 171.

The reason assigned to sustain the position taken by the larger number of American cases is that the additional insurance stipulated against is valid insurance, and valid at the time of the loss. And the courts adopting the position are logically compelled to hold that insurance, void or voidable at the time, is not over-insurance within the condition, although the ground of avoidance be afterward waived, and the insurance paid. The result is in such cases that the insured becomes entitled to collect by law the double insurance against which the condition was intended to guard. The same result occurs *pro tanto* where the second company compromises with the insured by buying its peace. Decisions which necessarily lead to such a result cannot be sound. Moreover if the doctrine be applied to merely voidable insurance, the court, in a suit upon one policy, may be required to try the validity of other policies, and that too without being able to make a decision binding between the parties to those policies. After a policy has been thus inci-

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dentally brought in question, and declared valid or invalid, it may be sued upon, and the court, with the aid of the parties then directly interested, may come to a different conclusion. It cannot be that the rights of parties under one contract can be made to depend upon the rights of other parties under a different contract. Certainly the condition in question was not intended to turn upon the event of a lawsuit between third parties, nor to look to the state of affairs which may exist at the happening of a loss. It was intended to prevent the assured from having or taking out other insurance, which he supposes to be valid, and the condition is broken when the additional insurance exists. The rule now prevailing was originally adopted in a case like the one before us, where the subsequent insurance was itself invalidated by the pre-existing policy. But if adopted at all, it must be extended to all cases within its reason. And in that view, as said by the Supreme Court of Ohio, there can be no distinction between a policy voidable on its face, and voidable for extrinsic matter. The subsequent insurance is either valid or void, and in either event the question is, was it insurance. *Fireman's Ins. Co. v. Holt*, 35 Ohio, 189; s. c., 35 Am. Rep. 601. We think that the condition intended that the subsequent insurance should work a forfeiture whether enforceable or not.

Affirm the judgment.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

BLUITT V. STATE.

(12 Tex. Ct. App. 39.)

Criminal law — evidence — hearsay — expert as to burglary.

In a trial for burglary the owner of the premises had described certain foot-prints to a witness. The witness was permitted to testify that the shoes of the defendant, produced on the trial, would have made such tracks. *Held*, error.*

CONVICTION of burglary. The opinion states the case.

W. E. Doyle and Burrow & Frisbie, for appellant.

H. Chilton, assistant attorney-general, for State.

* In *Lumbkin v. State*, 12 Tex. Ct. App. 341, a prosecution for using vociferous and obscene language near a private house, it was held error to permit the prosecuting witness to testify that the language was used in a manner calculated to disturb his family.

Snowden v. State.

HURT, J. Wash Bluitt was convicted of burglary. The evidence was purely circumstantial. The State relied (among other facts) upon certain tracks found in the yard of the prosecutor, near the house from which the bacon had been burglariously taken. Among the tracks was one which made a peculiar impression on the ground and if the State could show that the shoe of defendant made such impression, this fact would have been criminative.

To make this proof, the State, over the objections of defendant, proved by one Henry McDonald that he, McDonald, received from defendant a pair of shoes, giving a description of them; and he then went on to state "the shoes (meaning those received from defendant) would have made such a track as Crocket Phillips described to me as having been made in his yard."

This evidence was not only hearsay but was simply the opinion of the witness. We are not informed of the description given by the prosecutor to this witness. The description not being given the jury had no means by which to test the correctness of the witness' conclusion touching the similarity between the track and shoes. But this is not a matter about which the opinion of the witness can be taken. The witness could have described the shoes and have left it to the jury to compare them and the tracks and draw their own conclusions.

[Other matters omitted.]

For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

SNOWDEN V. STATE.

(13 Tex. Ct. App. 105.)

Criminal law — assault — by one in loco parentis.

A girl of fifteen years old, living with her elder brother and being supported by him, is subject to moderate restraint and correction at his hands.

CONVICTION of aggravated assault and battery. The opinion states the case.

Wooldridge & Phillips, for appellant.

H. Chilton, assistant attorney-general, for State.

HURT, J. The defendant, Frank Snowden, was convicted of an aggravated assault and battery, made upon one Fannie Snowden.

Fannie swears as follows : "I am the alleged injured party ; am sister to defendant ; am now fifteen years old. I have been living with defendant for about two years, ever since he married. My sister and I have been living with defendant for about two years as members of his family ; he has been boarding, clothing and educating us ; he sent us to the free school, and also to other schools when there was any in the neighborhood. He has always treated us kindly, and provided for us well. We would work for him when not at school. I remember the time I was at Mr. Harrison's house. I never asked my brother if I could go there. He told me when I left to come back in a short time, as he wanted us to go to work in the field. I stayed about one hour. I heard him calling me. I did not go. When I started home I met him ; he then asked me if I heard him calling me. I told him I did. He then asked me why I did not come. I told him because I did not want to. I told him that I did not intend to work much longer. He then gave me a push toward home ; he did not strike me ; he never hurt me. The Harrison family tried several times to get me to leave brother's and get me another home. I went home. Defendant never had any whip, and never struck me with a whip at any time. I went to the field to work."

Cross-examined, the witness stated : "I went and laid down on the bed after I came from the field. I was crying when I came through the field to the house. I went to the house before the others went to the house. I am fifteen years old."

(Re-examined.) "I was crying about the push brother gave me ; not because he hurt me, but because I was mad about it. I never went to bed on account of any injury inflicted on me by defendant. I went home before the other hands for the purpose of doing the work at the house. I think I milked the cows that evening. I usually went home to milk. I was some distance from Harrison's house when defendant and I met." There was other testimony showing that the defendant stood in *loco parentis* toward the injured party.

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Under this state of case the defendant requested the court to charge the jury the law applicable to this relation between the appellant and the party injured. Art. 490, Penal Code, provides that violence used to the person does not amount to assault or battery in the following cases: 1st, "In the exercise of the right of moderate restraint or correction given by the law to the parent over the child, the guardian over the ward, the master over his apprentice, the teacher over the scholar."

Does this law shield a person who stands *in loco parentis* toward the party injured, or must he be in fact the parent? We are of the opinion that it is not necessary for the defendant to be the parent of the assaulted party, to entitle him to the provisions of the above article. *Gorman v. State*, 42 Texas, 221; *Smith v. Rogers*, 24 Kans. 140; s. c., 36 Am. Rep. 254.

There being two theories presented in the statement of facts, the law applicable to the State's theory was given in the charge, but the court refused to give that which was demanded by the defendants. This was error for which the judgment is reversed and cause remanded.

Reversed and remanded

CASES

IN THE

COURT OF APPEALS

OF

WEST VIRGINIA.

SNYDER V. MARTIN.

(17 W. Va. 276.)

Vendor and purchaser — executed parol purchase — rights of subsequent judgment creditors.

One who has purchased land by parol, paid the price and entered into and retains peaceable possession, will be protected in equity against the claim of a subsequent judgment creditor of his vendor.

BILL to enforce a judgment lien. The head-note shows the facts sufficiently. The defendant had judgment below.

A. S. Snyder, for appellants.

Robert F. Dennis, for appellees.

GREEN, Pr. The principal question presented by this record is whether a parol contract, so far executed as to entitle the purchaser

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to a specific execution of the contract, is good against a subsequent judgment-creditor. Independent of any statute-law the lien of a judgment is a charge upon the precise interest which the judgment-debtor has and upon no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien, so that it shall incumber any greater or less interest than the debtor in fact possesses. The judgment-creditor has a charge on the interests of the defendant in the land, just as they stood at the moment the lien attached, therefore though he seems to have an interest, yet if he have none in fact, no lien can attach. The rights of the judgment-lien owner cannot exceed those which he might acquire by a purchase from the defendant with full notice of all existing legal or equitable rights belonging to third persons. The attachment of a judgment-lien upon the legal title forms no impediment to the assertion of all equities previously existing over the property. The judgment-lien is in equity but a charge on the equity held by the defendant, where the lien attaches. It can only hold the legal estate subject to the equity. It is well settled that a judgment-lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment-debtor. The lien of the judgment creates a preference over subsequently acquired rights, but a court of equity will always protect the equitable rights of third persons existing at the time the judgment-lien attaches. See Freeman on Judgments, pp. 309, 310 and 311, §§ 356, 357; *Churchill v. Morse*, 23 Iowa, 229; *O'Rourke v. O'Connor*, 39 Cal. 442; *Coster's Ex'r v. Bank of Georgia*, 24 Ala. 37-64; *Walke v. Moody*, 65 N. C. 599; *Ells v. Tousley*, 1 Paige, 280; *Morris v. Mowatt*, 2 id. 586 (22 Am. Dec. 661); *Brown v. Pierce*, 7 Wall. 205.

As illustrations of the extent and scope of the rule above laid down we find many cases, in which it has been held that a judgment-lien is subject to any express trust existing when the judgment-lien attaches. See *Ex'rs of Ashe v. Ex'rs of Livingston*, 2 Bay, 80; *Cover v. Black*, 1 Barr. 493; *Lodge v. Lyxley*, 4 Sim. 70; *Whitworth v. Gaugain*, 3 Hare, 416; *Shyrook v. Waggoner*, 4 Casey, 430; *Withers v. Carter*, 4 Gratt. 407. See also *Orth v. Jennings*, 8 Blackf. 420. So also it is held a judgment-lien must yield to prior equitable mortgages or other trusts. *Williams v. Craddock*, 4 Sim. 313; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Barr*

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v. *Hatch*, 3 Ohio, 538; *Kierstead v. Avery*, 4 Paige, 14; *Prior v. Penpraze*, 4 Price, 99. So also as to unrecorded deeds where the recording statutes only declare them void against purchasers without notice. See *Rodgers v. Gibson*, 4 Yeates, 111; *Jackson v. Post*, 9 Cow. 120; *Jackson v. Town*, 4 id. 606; *Jackson v. DuBois*, 4 Johns. 216; *Heister v. Fortner*, 2 Binn. 40. So also a judgment-creditor must yield to a prior equitable estate created by a written contract. *Hoagland v. Latourette*, 2 N. J. Eq. 254; *Finch v. Earl of Winchelsea*, 1 P. Wms. 282; *Mooney v. Dorsey*, 7 Smed. & M. 22; *Withers v. Carter*, 4 Gratt. 407. So too the judgment-lien must yield to prior vendors' liens or specific liens of any kind or prior equities of any description. See *Watkins v. Wassell*, 15 Ark. 73; *Arnold v. Patrick*, 6 Paige, 310; *Ringold v. Bryan*, 3 Md. Chy. 488; *Aldridge v. Dunn*, 7 Blackf. 249; *Walton v. Hargreaves*, 42 Miss. 18; *Matter of Howe*, 1 Paige, 125 (19 Am. Dec. 395); *Kierstead v. Avery*, 4 id. 2. So a judgment-lien must yield to a prior resulting trust in a third party. See *Williams v. Hollingsworth*, 1 Strobb. Eq. 103; *Hackett v. Callender*, 32 Vt. 98; *Ellis v. Touseley*, 1 Paige, 280. So too a judgment-lien will be postponed to a prior constructive trust. See *Everett v. Stone*, 3 Story, 447; *Brown v. Pierce*, 7 Wall. 205; *Baker v. Morton*, 12 id. 150.

It is true that in the State of Ohio a controversy long existed, whether an equitable mortgage was not an exception to the rule, that a judgment-lien must yield to all prior equitable liens held by a third person against the debtor's lands; but these controversies were the result of, or at least were much influenced by their statute law. In *White v. Denman*, 1 Ohio St. 110, these decisions are reviewed, and the conclusion reached is, that on the well-established principles of courts of equity an equitable mortgage ought to have priority over a subsequent judgment-lien, and that as an original question the court would have held, that this equitable rule was not set aside or controlled by the Ohio statute law; but as it had been held otherwise on construction of their statute by their Supreme Court in several cases, these decisions ought to be acquiesced in.

And in several States it has been held that a judgment-lien ought to have priority over a prior secret vendor's lien. See *Webb v. Robinson*, 14 Ga. 216; *Johnson v. Cawthorne*, 1 Dev. & B. (N. C.) 32-35 (27 Am. Dec. 250); *Roberts v. Rose*, 2 Humph. 145-147. But these decisions were based on peculiar views by these courts of the character of a vendor's lien. And in truth in the United States gen-

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erally the vendor's lien has received but little countenance, and in a number of States it has been held to have no existence, as in Pennsylvania (see *Kauffelt v. Bower*, 7 S. & R. 64), in North Carolina now, though not formerly (see *Womble v. Battle*, 3 Ired. Eq. 182), in South Carolina (see *Wragg's Rep. v. Comp. Gen.*, 2 Dessau. 509-520), in Massachusetts (Story, J., in *Gilman v. Brown*, 1 Mason, 192-219), in Maine (see *Philbrook v. Delano*, 29 Me. 410-415), and in Kansas (see *Simpson v. Mundee*, 3 Kan. 172); and in other States its existence is undecided and doubtful, as in New Hampshire, Connecticut and Delaware (see *Atwood v. Vincent*, 17 Conn. 576-583; *Budd v. Busti*, 1 Harr. 69 and 74, and *Arlin v. Brown*, 44 N. H. 102); and it has been received with disfavor in other States, including Virginia. But as now by statute law in this State the secret vendor's lien has been abolished and it can have an existence only when reserved on the face of the deed, which must be recorded, there can be no question that in this State a vendor's lien, when it has any existence, will have priority over a subsequent judgment. It may therefore be laid down as a universal rule established by many cases, that a judgment-lien is always subject to every possible description of equity held by a third party against the debtor at the time the judgment-lien attached; and that it is immaterial whether the rights of such third party consist of an equitable estate or interest in the judgment-debtor's land, an equitable lien on his land, or a mere equity against the debtor which attaches to or affects his land. Nor is it all material whether the judgment-debtor has or has not, when he contracted his debt or obtained his judgment or docketed the same, notice of such equitable estate, equitable lien, or mere equity. If they be prior in time to the judgment, they will always be preferred to the judgment-lien. The authorities we have cited abundantly sustain this conclusion, and there is no exception to this universal rule, except where such exception has been made by some statute law.

Unquestionably therefore a purchaser of land by parol contract, to the full extent that a court of equity would recognize his equity against the party, who by parol contract had agreed to sell him the land, should be held in a court of equity to have rights superior to any subsequent judgment-creditor, whether the judgment-creditor had or had not notice of his contract to purchase the land, unless some statute law has rendered the judgment-creditor's lien superior to his equity. It is claimed that the statute of frauds produced

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this effect, and that after its passage the judgment-creditor's lien must be held as superior to any equitable estate or right, which a third party had before the rendition of the judgment acquired from the debtor to any land, which was based in whole or in part on the fact, that he had made a parol contract for the purchase of the land. We will now consider whether this be the real effect of the statute of frauds.

This statute, so far as it relates to the sale of lands, is to be found in chapter 98, page 535, of our Code, and is in these words: "No action shall be brought upon any contract for the sale of real estate unless the contract or some memorandum or note thereof be in writing and signed by the party to be charged thereby or his agent." This statute was first passed in the 29th year of Charles the Second, A. D. 1677. Its language then was "that from and after the fouer and twentyeth day of June, which shall be in the year of our Lord one thousand six hundred and seaventy and seaven, All Leases Estates Interests of Freehold or Terms of years or any uncertaine Interest of, in or to any Messuages Mannours Lands Tenements or Hereditaments made or created by Livery or Seisin onely or by Parole and not putt in Writeing and signed by the parties soe makeing or creating the same or their Agents, thereunto lawfully authorized by Writeing, shall have the force and effect of Leases or Estates at Will onely, and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect, Any consideration for making any such Parol Lease or estates or any former Law or Usages to the contrary notwithstanding." See Throop on Verbal Agreements, 21, 22.

This statute with slight variations has been in force ever since its passage in 1677. When it was passed, courts of equity were, as they have ever since been, in the habit of treating as a trustee, a party, who by *fraud* had procured the legal title to land from another. The party, who had thus been defrauded, was held by a court of equity to be still the equitable owner of the land; and the party, who had procured the legal title by fraud, was held by a court of equity to be a mere trustee for the other; and the court would compel him as such to account for the rents and profits, and would order a reconveyance of the land to its real or equitable owner. These trusts, which arose not from the intention of the parties, and from frauds committed by one party on another, have received the appellation of *constructive* trusts; and courts of equity, have always ex-

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exercised the power of raising a trust by construction in cases of fraud, as the most suitable mode of putting it in the power of the court to do equal and complete justice between the parties. See Perry on Trusts, ch. 4, pp. 186, 187, §166.

The statute of frauds in express terms declares, that it shall be binding on courts of equity as well as courts of law. And since its passage courts of equity as well as courts of law have always held *naked* parol agreements for the sale of lands void, even if the defendant admitted the agreement as stated by the plaintiff, provided he at the same time pleaded the statute. See *Heth's Ex'r v. Wooldridge's Ex'r*, 6 Rand. 609 (18 Am. Dec. 751); 2 Bro. C. C. 564; 1 id. 416; 4 Ves. 23; 6 id. 12; 2 H. Bl. 63. But after the passage of this statute courts of equity held, that if after a parol contract for the sale of land was entered into, it was so far performed by the purchaser that a refusal to execute the contract by the seller would operate a fraud upon the purchaser, and would leave him in a situation which did not lie in compensation, then they would treat the seller, who holds the legal title, as a trustee, and the purchaser as the equitable owner of the land, and order the seller to convey the same to the purchaser on his full compliance with the contract, not because the court regarded the parol contract as valid, but because the fraudulent conduct of the seller in permitting the purchaser to so far perform his contract justified the court, on the general principles above explained, in exercising its accustomed power of raising a trust by construction in such fraudulent case, as the only mode of putting it in the power of the court to do complete justice between the parties.

It is universally agreed, that the only ground on which courts of chancery consider part performance of a parol agreement to sell land as creating an equity in the purchaser to be regarded as the equitable owner of the land, and therefore to have the contract specifically executed, notwithstanding the statute of frauds, is, that if he were not so held to be the equitable owner of the land, the seller would commit a fraud upon him. See *Hamilton v. Jones*, 3 Gill & J. 127; *Heth's Ex'r v. Wooldridge*, 6 Rand. 605; *Carlisle v. Fleming*, 1 Harr. 421-430; *Townsend v. Houston*, id. 532-540; *Anderson v. Chick*, 1 Bailey Eq. 118-124; *Rathbun v. Rathbun*, 6 Barb. 99-100; *Despain v. Carter*, 21 Mo. 321; *Gilmore v. Johnston*, 14 Ga. 683; *Farrar v. Patton*, 20 Mo. 81. Whenever therefore after a parol contract has been entered into for the sale of land, and it has been so far per-

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formed by the parties as to place the purchaser in a position, that if the contract was treated as void, it would operate as a fraud on the purchaser, he will be regarded by a court of equity as the equitable owner of the land, and on his performing his contract in full a court of equity will decree that a deed shall be made to him by the seller. In other words, such oral contract, when followed up by such part performance, originates a constructive trust, just as other frauds give rise to constructive trusts. This constructive trust having been raised, I can conceive of no reason why it should not like all other constructive trusts, equitable estates and equities, be preferred to a subsequent judgment-lien. We have seen, that every imaginable equity attached to the land is preferred to a subsequent judgment-lien. Why should this equity be excepted from this universal rule? Not because it originated in a fraud, which bound only the conscience of the seller, and therefore not binding the conscience of the judgment-creditor of the seller, it ought not to be enforced against him; for if this were so, the same reasoning would apply to every constructive trust originating in the fraud of the judgment-debtor. Yet we have seen, that all such constructive trusts have ever been held to be enforceable against the subsequent judgment-creditor of the party committing the fraud. This preference, which a Court of Chancery always gives to the equity of a third person over a subsequent judgment-lien, ought not to be set aside by reason of its acknowledgment being in contravention of the policy of the statute of frauds. The courts of equity under circumstances hold, that this statute does not control the case so far as the third party and the judgment-debtor are concerned. Why then should it be supposed, that the judgment-creditor can stand in any better position than his debtor in contravention of a well-established rule of courts of equity of universal application? It cannot be because the statute of frauds was passed for the protection of the judgment-creditor; for it is obvious on the very face of this statute that it was not passed to protect his interests, but solely to protect the rights of the parties to the oral contract for the sale of the land. The preamble of the act shows clearly that this was its object and its only object. And courts of equity under such circumstances hold that the rights of the parties to the oral contract can only be protected by the specific enforcement of the contract notwithstanding the statute of frauds. How can a judgment-creditor claim that this is in contravention

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of the statute, if it was not enacted for his benefit? And the preamble of the statute shows that it was not. This preamble is: "For the prevention of many fraudulent Practices, which are commonly endeavored to be upheld by Perjury and Subornation of Perjury Bee it enacted by the King's most excellent Majestie by and with the advice and consent of the Lords SPIRITUAL and TEMPORAL and the Commons in this present Parlyament and by the authoritie of the same."

It is obvious from this preamble, that the object of this statute was not to protect creditors, but to prevent a party to an oral contract for the sale of land being defrauded by the other party suborning witnesses to testify falsely as to the terms of the contract. In other words, the statute was a mere law of evidence intended to protect from injury the parties to the contract; and the creditors of neither of the parties were intended to be either benefited or injured by its passage. Why then should not the creditor be left in the exact position which he occupied before, that is, having a right by a judgment to obtain a lien on all the lands of his debtor, subject however to all equities of third persons, existing at the time his judgment-lien attaches? I confess I can see no good reason to be found in this statute, why the creditor should not stand just where he would have stood, had the statute never been passed. In accordance with these views it was decided in *Massey v. McIlwaine*, 2 Hill Ch. 428, "that a parol contract to convey land, which has been performed, and which would be set up by a court of equity, has equal validity with a written contract; and the party entitled to specific performance may hold the land against subsequent judgment-creditors of the vendor."

But it is insisted, that if the statute of frauds does not render a parol contract, so far executed as to entitle the purchaser to a specific execution of the contract, inoperative as against a subsequent judgment-lien, our recording acts will have that effect; and if they alone do not have that effect, when construed in connection with the statute of frauds, it ought to be held that this effect follows. The recording acts supposed to produce that effect are the 4th and 5th sections of chapter 74 of our Code, page 474. They are:

"4. Any contract in writing made in respect to real estate or goods and chattels in consideration of marriage, or made for the conveyance or sale of real estate or a term therein of more than five years, shall from the time it is duly admitted to record be, as

against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

“ 5. Every such contract, every deed conveying any such estate or term, and every deed of gift or deed of trust or mortgage conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract or deed may be.”

These acts have been in force since the formation of this State and for a long time previous thereto. Their history and the substance of the Virginia decisions rendered in construing them are given in the opinion of brother Johnson, and need not be here repeated. When they were enacted, we have seen that the common law and the law as administered by courts of equity protected in very different degrees creditors and purchasers. The purchaser had only to ascertain that the seller of land had the legal title in him, and he was perfectly protected from all risk, if he acted in good faith and did not buy land, on which he knew or had the means of knowing some third person had an equitable lien, or which he did not know or had not the means of knowing in equity and justice belonged to such third person. But the status of the creditor was far different. The creditor to a large extent trusts his debtor on his faith in his integrity. He does not, when he credits him, rely solely or principally on the property he may own ; for he knows that he may dispose of all his property before a judgment is rendered against him ; and when a judgment was obtained against him, he acquired a lien on his lands, which was good only against subsequent conveyances and liens legal or equitable, but not against third persons, who had prior equitable liens or claims of any character on his lands, or who were the equitable owners of the land though their claims or this equitable ownership were secret. For courts of equity hold that property, which belongs in equity and good conscience to A., should not be taken for the debt of B. ; and therefore they would not suffer the lien, which a judgment-creditor had acquired on the legal title, to be used as a means of producing such result. A perfect protection to the purchaser of real estate could be afforded without wrong or serious inconvenience to third persons, by simply providing a means by which he could ascertain readily and certainly, whether the party, of whom he

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was about to purchase, had the legal title. For if he had, the common law rendered him perfectly safe in making the purchase. But such perfect protection could not be given a creditor without producing most disastrous results. The right of the debtor to dispose of his property before judgment could not be interfered with without producing immense mischief ; nor could the creditor, after he obtained a judgment, be put upon the footing of a purchaser without the grossest injustice to third parties. Still some protection could be extended to creditors without injustice or serious inconvenience to third persons. If the evidence of this equitable title to land or of this lien on land was in writing, it might be put of record, so that the creditors might have the means of readily ascertaining its existence. But there were large classes of equitable titles and equitable liens, of the existence of which there was no written evidence. There was therefore no such facile and just mode of protecting creditors against such equitable titles and liens. It is obviously impossible to protect the creditor against all such equitable liens and titles without doing the grossest and most palpable injustice to third persons. Protection against any such title or lien could of course not be effected by any recording act ; and the legislature in its wisdom concluded that it had better not attempt to furnish protection to the creditor in any other manner than by recording acts. Protection to a certain limited extent could be furnished creditors in this manner without injustice or serious inconvenience to third persons. Protection in any other manner involves serious difficulties, if wrongs to third parties were to be avoided ; and the legislature determined that it was safer not to attempt such protection, and if the equitable title or lien of a third person was not evidenced by a writing, to leave his rights and those of the judgment-creditor precisely as they had been fixed by the common law and the law as administered by courts of equity.

Our recording acts above copied furnish to a purchaser perfect protection by simply requiring all deeds to be recorded, and if unrecorded, rendering them void as to purchasers for valuable consideration without notice. Such purchasers needed no protection against equitable titles and liens. The creditor by these acts is obviously protected to the extent of requiring all contracts for the sale of lands, when in writing, and all deeds conveying lands to be recorded, and by declaring them void against creditors if not recorded. This is all the protection these acts afford the creditor,

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and is in truth all the protection which can be afforded him by any recording act. These acts do not, and no recording act could afford a creditor any protection against any equitable title or lien, which was not evidenced by writing, such for instance as an equitable title to land arising from a parol contract having been made and so far executed as to entitle the purchaser to a specific execution of the parol contract, or any other constructive trust, or any resulting trust. Nor has the legislature thought proper to protect the judgment-creditor by any other form of legislation against these sorts of equitable titles and liens ; for we have seen that the statute of frauds furnishes him no such protection.

I have not been able to find in our recording acts the least evidence that the legislature intended to avoid for the benefit of a creditor an equitable title, which was preceded by a verbal contract, and which was based on a fraud attempted by the seller in refusing to make a deed for the land, after it had been improved by the purchaser. I could not expect to find such intention in any recording act. It would be entirely out of place in such an act.

It is claimed however that the statute of frauds and these recording acts are *in pari materia* and should be taken together, as if they were one law, the two having but one object in view. I have shown that the object in view of the passage of the statute of frauds was, as plainly shown by its preamble, not to be the protection of creditors, but the protection of one of the parties themselves to contracts for the sale of lands, against the subornation of perjury which was practiced by the other party, in procuring witnesses who by perjury would misstate a parol contract. Our recording acts have an entirely different object in view. They operate only on written contracts as to the contents of which there can be no misrepresentation by perjury. These recording acts were not intended to protect one party to a contract for a sale of land from the fraud and perjuries of the other ; but they had in view solely the protection of other parties, purchasers and creditors, from other and different evils, that is, from secret liens in writing. These recording acts and the statute of frauds ought not therefore to be construed together, as if they constituted one act. In fact their objects are so unconnected, that I could hardly conceive of their being incorporated into one act. If they had been enacted for the first time by this State, and had been incorporated into one act, this would have rendered them unconstitutional and void, as embracing more than one object.

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When the statute of frauds was passed, more than two hundred years ago, there was no legislative disposition to protect creditors. There being then very little active business of any sort, creditors were then a comparatively unimportant class. But as commerce and business increased, the importance of creditors as a class increased, and the necessity was for the first time seen of giving them more protection than was given them by the common law and the law as administered by courts of equity. Hence the passage in all our States and in England, in a comparatively recent time, of recording acts for the protection of purchasers and creditors. The common law and the law as administered by courts of equity afforded both these classes all the protection which they needed two hundred years ago ; and there was then no legislation for their protection. Such legislation is all modern.

The results I have reached were reached by the Court of Appeals of Virginia in a number of cases similar to the one before us. See *Floyd's Trustees v. Harding*, 28 Gratt. 401 ; *Hicks v. Riddick*, 28 id. 418 ; *Shipe v. Repass*, 28 id. 716 ; *Burkholder v. Ludlam*, 30 id. 255 ; s. c., 32 Am. Rep. 668 ; *Young v. Devries*, 31 Gratt. 304.

Brother Johnson in his opinion points out what he deems the gross absurdity of our statute law, if interpreted to render void as to creditors a written contract unrecorded, and to regard as valid against creditors a parol contract so far executed as that its specific performance would be enforced. It must be admitted, that our law is not such as to commend itself to my mind as just and reasonable, and because of this I have felt every disposition to place on it the construction which brother Johnson puts upon it. But I have been unable to place such a construction upon it. To do so would be to legislate. " It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace all cases because no good reason can be assigned why they were excluded from its provisions." Justice McLEAN's opinion in *Denn v. Reid*, 10 Pet. 524. In all other respects I concur in the opinion of brother Johnson. The decree of the Circuit Court of Greenbrier county of June 15, 1878, should in my opinion be affirmed, and the appellees should recover of the appellant their costs in this court expended and \$30 damages.

Judgment affirmed.

HAYMOND and MOORE, J.J., concurred.

JOHNSON, J., dissented.

MCMECHEN v. MCMECHEN.

(17 W. Va. 682.)

Will—evidence—burden of proof to establish.

The burden of proof of the sanity of a testator is on the proponents of a will, but not so of absence of fraud or undue influence. (*See note, p. 686.*)

PROCEEDINGS to prove a will. The will was rejected below.

W. P. Hubbard and Daniel Lamb, for appellants.

James Morrow, Jr., for appellees

JOHNSON, J. [Omitting other matters.] It is insisted by counsel for proponents, that the court erred in giving to the jury at the instance of contestants instructions, numbers one, five, six, seven and eight, and in modifying instructions, numbers fifteen and sixteen, asked by proponents. Instruction number one is as follows: "The jury is instructed, that the burden is on the proponents of the will in question, to prove the due execution thereof, and that the same is the last will of a free and capable testator."

It seems to be conceded in the argument of counsel for proponents, that the burden is on the proponents of the will to prove that it was the will of a capable or competent testator; but it is denied that the burden is on them to prove that it is the will of a free testator. The word free as used in the instruction must be understood to mean, that no fraud was practiced on the testator, and no undue influence was exercised to induce him to execute the will.

In *Dean v. Heirs of Dean*, 27 Vt. 746, there was an appeal from a decree admitting a will to probate. The court in its opinion says: "It is also insisted, that no testimony appears in the case, showing that the will was ever published by the testator, or that he was of sound and disposing mind at the time of its execution. That the testator was of a sound and disposing mind is a legal presumption. It is for those who object to the will to show such an incapacity, if it exist."

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Perkins v. Perkins, 39 N. H. 163, was an appeal from the decision of the judge of probate disallowing a will. The court held, that "every man is presumed to be of sane mind, until the contrary is proved. In the proof of a will the presumption of sanity is sufficient to support the will, till some evidence to the contrary is offered." To the same effect is *Zimmerman v. Zimmerman*, 23 Penn. St. 375. But these authorities do not state the correct rule. At common law a man could not make a will. But by the English statute, 32 Henry VIII, persons might dispose of their property by will. There was nothing in this statute to change the rule of the common law as to the legal presumption that a man is of sound mind until the contrary appears. But a few years after the statute of 34 and 35 Henry VIII was passed, and chapter 5, section 14 of that statute provides, that "wills, etc., made, etc., by any person *de non sane* memory shall not be taken to be good or effectual in law." The effect of this statute was, in the proof of a will, not only to require that it was executed as the statute required, but that at the time of its execution the testator was sane. And so the English courts seem to have regarded it. *Harris v. Ingledew*, 3 P. Wms. 91; *Wallis v. Hodgeson*, 2 Atk. 56. In this case Lord HARDWICK said: "It had been determined over and over in this court, that you must show the person to be of sound and disposing mind, where a will is to be established as to real estate, and especially if there are infants in the case; proving it to be well executed according to the statute of frauds and perjuries is not sufficient." See also *Barry v. Butlin*, 1 Curt. 637, in which Baron PARKE said: "The strict meaning of the term '*onus probandi*' is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will. It is in general discharged by the proof of capacity, and the fact of execution."

The effect therefore of the English statute enacting that a man could not execute a will unless he was of sound mind, was in that case to take away the common-law presumption of sanity, and throw the burden of proof upon the propounder of the will, not only to show the due execution of the will, but the additional fact that at the time of the execution the testator was of sound mind.

The statutes of wills of all the States, so far as I know, declare that the testator must be of sound mind, before he can make a will. This is the Massachusetts statute, which is similar to ours, and

The statute in this particular shifts the presumption from where the common law laid it; but it does not touch the presumption that all men are honest, but leaves it in the cases of the execution of wills as in other cases, where it was at common law. The instruction did not therefore propound the law correctly.

[Omitting other matters.]

Judgment reversed, cause remanded.

The other judges concurred.

NOTE BY THE REPORTER.—An interesting question arises as to the presumption when partial insanity has been shown. In *Kingsbury v. Whitaker*, 22 La. Ann. 1053; a. c., 35 Am. Rep. 278, it was held that it will be presumed that a will, made by a person habitually insane, apparently sane and judicious, and containing nothing "sounding to folly," was made in a lucid interval. The testator was a man subject to attacks of *delirium tremens* and was frequently in asylums for treatment therefor. On the other hand, in *Jackson v. Van Dusen*, 5 Johns. 159 (4 Am. Dec. 330), it is said "that after a general derangement has been shown, it is incumbent on the other side to show that the party who did the act was sane at the very time when it was performed." This was said in regard to formal proof of the execution of a will, the court having also ruled that sanity of a testator is in the first instance presumed. The expression therefore is probably *obiter*; but which of the two above opinions is the law?

The Louisiana case cites *Cartwright v. Cartwright*, 1 Phillimore, 90. In this case Sir WILLIAM WINNE, in 1798, adjudged that "the rule of the law of England is the civil law; that it is incumbent on the person seeking to establish the will of one habitually insane, to show that he had lucid intervals; that the best proof of the existence or non-existence of lucid intervals "is that which arises from the act itself," and "if it can be proved that it is a rational act rationally done, the whole case is proved." Quoting from Swinburne he continued: "If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any quiet and clear intermissions at all, yet nevertheless, I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament."

The same doctrine is recognized in *Scruby v. Fordham*, 1 Adams, 74. This was a question of the validity of a partial cancellation of a will by a lunatic, and the cancellation was held, from the manner of it, to have been made when the testator was insane. Sir JOHN NICHOLL said: "It must have recourse therefore to the usual mode of ascertaining it in such cases—which is by looking at the act itself—for this I take to be the general rule, where a will is traced into the hands of a testator whose sanity is once fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to that will, there is no direct *constat*. In other words, the agent is to be inferred rational, on the contrary, in such cases, from the character, broadly taken, of his act." In *McAdam v. Walker*, 1 Dow, 178, Lord ELDON, *obiter*, approved the same doctrine. Both these cases are cited in the principal case.

In *Attorney General v. Paruther*, 3 Brown Ch. C. 441, marg., Lord THURLOW said: "If derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers." This was cited and approved by Sir WILLIAM GRANT, in *Hall v. Warren*, 9 Ves. 611, and by Lord ERSKINE, in *White v. Wilson*, 13 id. 88. The latter only was a case of a will. It was also expressly approved by Dr. Lushington, in *Prinsep v. Sombre*, 10 Moore P. C. 245, a will case.

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In *Nichols v. Freeman*, 1 Sw. & Tr. 230, Sir C. CRESSWELL held that the rationality of the will, though not conclusive, is strong evidence of its having been made in a lucid interval. He disapproved the expression of Sir WILLIAM WINNE, in *Cartwright v. Cartwright*, that the rationality of the will proved the testator's sanity. He said: "After a paroxysm of insanity has passed away, insanity may still be lurking in the mind of the patient, although there is nothing apparent on the surface to show it."

In *Smith v. Tebbitt*, L. R., 1 P. & D. 398, a will case, it was held that mental disease being established will be presumed to continue.

In *Breed v. Pratt*, 18 Pick. 115, it was held that where a testator is under guardianship for insanity, this is *prima facie* evidence of testamentary incapacity. In *Titlow v. Titlow*, 54 Penn. St. 216, it was held that a finding of lunacy with lucid intervals casts the burden of showing sanity on those sustaining the will. *Obiter*, the same was held in *Carpenter v. Carpenter*, 8 Bush, 283. The same was held as to a deed, in *Ballow v. Clark*, 2 Ired. L. 23. So as to a will, in *Saxon v. Whitaker's Ex'r*, 30 Ala. (N. S.) 237. In this case the court said: "It is incumbent on him to prove the existence of a lucid interval at the very time the will was executed. For although it may have existed shortly before the execution of the will, its duration or continuance is too uncertain to be matter of legal presumption. The length of a lucid interval is not a question of law, but a pure question of fact. Lunacy is usual or habitual insanity, with occasional clear or calm intermissions of the disorder. A lunatic is a person usually mad, but having intervals of reason. Lucid intervals are the calm or clear intermissions of the usual insanity—the mere temporary cessations of the malady—the spaces between its control and mastery of mind. To say of a man that he has lucid intervals, is in legal contemplation equivalent to saying that he is habitually insane, but enjoys intervals of reason. The legal implication from the fact that he has lucid intervals is that he is not cured of his lunacy. As a lucid interval is temporary in its nature, and uncertain in its duration, the law will not presume its continuance for a month, a day, or an hour. After the lunacy of a testator has once been established, the mere proof of a subsequent lucid interval does not shift the burden of proof. If it did, the consequence would be that the burden might be shifted twenty times in the course of the trial, by proof of twenty lucid intervals, all of which may have occurred before the will was made; and thus there would be a practical abrogation of the fixed rule, that when lunacy is once established the law presumes its continuance until it is shown to have been cured; and that although a will made by a lunatic during a lucid interval may be valid, yet it is incumbent on the party propounding such will to prove that it was in fact made during such lucid interval." The like doctrine was held in the case of a mortgage. *Ripley v. Babcock*, 13 Wis. 425.

The weight of authority therefore as to general and habitual insanity is that the lucidity must be proved by the party alleging it. As to temporary and exceptional attacks, this doctrine has been thought inapplicable. Thus Swinburne mentions as an exception to the rule, the case of a testator's "falling into some frenzy, upon some accidental cause, which is afterward taken away," and to this extent his approval of the doctrine of the principal Louisiana case, we think, must be limited. So in *State v. Reddick*, 7 Kans. 151, the court said: "Drunkenness is temporary unsoundness of mind. Does it draw after it any such presumption?" Answering this in the negative. So held in *Carpenter v. Carpenter*, 8 Bush, 287, a case of occasional incapacity from epilepsy. The court said: "The presumption of incapacity does not apply however to a case like the one under consideration. The paroxysms or fits were periodical, and the grantor generally recovered from them in a few days. One may become delirious from fever, or have *mania a potu* from the use of intoxicating drinks, the deranged condition of the mind ceasing when the cause producing it is removed. In all such cases there is no presumption that the unfortunate condition of the mind continues. The rule is that where the 'diseased condition of the mind is temporary, continued insanity or want of capacity is never presumed.' Redf. on Wills, 92." In *Lewis v. Baird*, 3 McLean, 55, it was held that occasional insanity from intemperance would not avoid a contract. The same was held in *People v. Francis*, 38 Cal. 189, where the court said: "This presumption would have no application to a temporary insanity, resulting from some transient cause. If a person be proved to have had on a particular occasion a paroxysm of *mania a potu*, or delirium caused by fever, or by sudden and severe mental agony, there would be no presumption that the same state

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of mind continued after the existing cause was removed. On the contrary, the presumption would be that the mind was restored to its normal condition when the disturbing element had ceased to operate." So in *Hix v. Whittemore*, 4 Metc. 545, and *Halley v. Webster*, 21 Me. 461, of insanity caused by a violent disease. The exception is recognized in *Thornton v. Appleton*, 29 id. 204, a case of contract.

Wharton says (2 Ev., § 1258): "It has been frequently said to be a presumption of law that chronic insanity is presumed to continue; but that such presumption does not exist as to fitful and exceptional attacks. This however is a mere *petitio principii*; it being tantamount to saying that chronic insanity is chronic, and transient insanity is transient. The presumption as to the continuance of insanity--such is the more correct statement--is one of fact, varying with the particular case."

We think the Louisiana case is right upon the facts, but that its *dictum* cannot be sustained. The true distinction is between habitual insanity with occasional lucid intervals and habitual sanity with occasional insane intervals. The presumption of the continuance of the habitual state continues in both instances.

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(18 W. Va. 212.)

Bank — president — authority to transfer negotiable paper.

The president of a bank has no inherent authority to indorse or transfer negotiable paper belonging to the bank, but such authority may be implied by his habit, known to the directors, of doing acts of the same general character.

ACTION on a promissory note. The head-note and opinion show the point. The plaintiff had judgment below.

James H. Ferguson, for appellant.

Smith & Knight, for appellee.

GREEN, J. [Omitting other matters.] It thus becomes a question of first importance, whether McFarland, the president of the Branch-Bank of Virginia at Charleston, had authority to transfer this note owned by the bank. The cashier is the chief executive agent of a bank and as such has by virtue of his office large powers. Among them he has full charge, control and power of disposition over the personal property of the bank, such as specie, negotiable notes or bills. It has been held that he has not the power without special authority to transfer a negotiable promissory note of the

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bank to a third party. See *Hallowell & Augusta Bank v. Hamlin*, 14 Mass. 180; *Hartford Bank v. Barry*, 17 Mass. 97. In *Farrar v. Gilman*, 19 Me. 441 (36 Am. Dec. 766), the correctness of this position was regarded as questionable; but it may be now regarded as settled that the cashier of a bank has *prima facie* authority by virtue of his office to transfer negotiable promissory notes belonging to the bank in the transaction of the usual business of the bank, and his transfer of such a note to a party who receives it in good faith, confers a valid title to the note on the transferee. See *Wild v. Bank of Passamaquoddy*, 3 Mas. 505; *Bank of State v. Wheeler*, 21 Ind. 90; *City Bank v. Perkins*, 29 N. Y. 554; *Cooper v. Curtis*, 30 Me. 488; *Kimball v. Cleveland*, 4 Mich. 606; *Crockett v. Young*, 1 Sm. & M. 241; *Everett v. United States*, 6 Port. 166 (30 Am. Dec. 584); *Bridenbecker v. Lowell*, 32 Barb. 9; *Fleckner v. United States Bank*, 8 Wheat. 357; *Robb v. Ross County Bank*, 41 Barb. 586; *Harper v. Calhoun*, 7 How. (Miss.) 203; *Lafayette Bank v. State Bank*, 4 Mo-Lean, 208.

But if the transfer by the cashier of a bank of one of its negotiable notes was proven to have been made to a third person in a transaction which was plainly out of the usual course of business, and the transaction on its face showed that the transferee must have known that the cashier was assuming a power and transacting business outside of his duties as cashier, and was transferring a negotiable note of the bank for a purpose for which he as such cashier had no right to transfer a negotiable note belonging to the bank, such transfer would be regarded as unauthorized, and the transferee could not be held to be a *bona fide* holder, even though he did give a valuable consideration for the note. See *Everett v. United States*, 6 Port. 181; *Bank of State v. Wheeler*, 21 Ind. 94; *City Bank v. Perkins*, 29 N. Y. 554. And this great power and authority is possessed by no other officer by virtue of his office. It is not even possessed by a clerk who is acting as cashier in the temporary absence of the cashier, though such acting cashier would have power to do all such acts, as were necessary to carry on the usual business of the bank, such as to pay checks and receive payment of notes and deliver them to the persons entitled to them. See *Potter v. Merchant's Bank*, 28 N. Y. 650.

It is true that in *Leavitt v. Connecticut Peat Company*, 6 Blatchf. 150, the president of the Connecticut Peat Company transferred a note belonging to the company to a director of the bank, and SHIP-

MAN, J., held the transfer invalid, and put it on the ground that the defendant was in a position in which he ought to have known that the president had not authority to transfer a negotiable note of the company by its by-laws, and did not put it on the broader ground that the president of the company had not by virtue of his office power to make such transfer, as he might well have done; for as such president he would have had no more authority to make such a transfer than the president of a bank, and it has been decided that the president of a bank has no such authority by virtue of his office. See *Gibson v. Goldthwaite*, 7 Ala. 293; *Hoyt v. Thompson*, 1 Seld. 335. Indeed the spirit of the decisions generally shows that the inherent powers of a president of a bank are very limited; and it has been said that the entire collection of judicial decisions justifies the annunciation of only one act as falling within the proper inherent powers of the president. This solitary power is to take charge of the litigation of the bank, employ counsel in suits against the bank, institute suits in the name of the bank, and appear and defend suits against the bank. See *First National Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555; *Hodge's Ex'r v. First National Bank of Richmond*, 22 Gratt. 58.

It is true that the president of a bank, or any one else, may be authorized to indorse or transfer its negotiable notes; and it is also true that such authority need not be proven by showing that it was expressly conferred by the board of directors, but it may be proven by the existence of such facts as constitute clearly a public holding out that the indorsement or transfer of the negotiable notes of the bank by the president was within the scope of his legitimate delegated authority. The inference that such authority has been conferred may be legitimately drawn by proving that he was in the habit of indorsing or transferring negotiable notes of the bank, or other choses in action of any other character, such as bonds and mortgages. The transfer and disposition of choses in action other than mercantile paper would be the exercise of a power of a similar and more comprehensive character, for the cashier of a bank has no authority to dispose of or transfer by virtue of his office choses in action of the bank other than mercantile paper, though as we have seen he does possess inherently the power to dispose thus of mercantile paper. See *Barrick v. Austin*, 21 Barb. 241; *Holt v. Bacon*, 25 Miss. 567.

But it is also true that it could not be legitimately inferred from

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his habit of receiving deposits in the bank or his receiving payment of its negotiable notes, that the power to dispose of or transfer a negotiable note had been conferred on the president of a bank; for this would be the exercise of an entirely different sort of power, and one much more limited in its character. Thus the clerk of the cashier of a bank in his temporary absence may receive deposits or payment of notes but cannot dispose of or transfer the negotiable notes belonging to the bank (*Potter v. Merchant's Bank*, 29 N. Y. 64), there being, as pointed out in that case, a marked difference between these two powers. Of course the directors of a bank may ratify the disposal or transfer of a negotiable note belonging to the bank by its president; and the receipt by the directors of the consideration on which such a transfer of a negotiable note belonging to the bank by its president, when this consideration had been received by the president for the bank without their authority, would be regarded as impliedly confirming his action, if it were shown that the directors were afterward notified or became acquainted with the action of the president, and failed to return the consideration to the transferee of the negotiable note. These principles are fairly deducible from the case of the *First National Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555; *Merchant's Bank v. State Bank*, 10 Wall. 604; *Hodge's Ex'r v. First National Bank of Richmond*, 22 Gratt. 69.

Applying this law to the facts in this case, it is obvious that James C. McFarland, the president of the Branch-Bank of Virginia, had no power *ex officio* as such president to transfer the note sued on and a large number of other negotiable notes to Isaac N. Smith in consideration of the surrender of notes of the Bank of Virginia, most of which were not payable at the Branch-Bank of Virginia at Charleston, and which therefore that bank was not then bound to redeem; and it is not pretended that any express authority to make such transfer had ever been conferred on him. The only question is, whether the implied authority to make such transfer could be legitimately inferred from the facts proven in this case.

[Omitting this discussion.]

Judgment reversed.

HAYWOOD and JOHNSON, JJ., concurred.

ABRAHAM V. SWANN.

(18 W. Va. 274.)

Limitation — statute of — new promise — evidence.

A debtor wrote to his creditor: "you shall be paid as I get the money over and above my bread and meat;" "if I get the money I will then pay you;" "I have acknowledged the debt to you in my letters again and again, and therefore it stands as good as if you had my bond." *Held*, a valid acknowledgment and promise in writing to remove the bar of the statute of limitations. Also *held*, that parol evidence was competent to identify the debt. (See note, p. 695.)

ASSUMPSIT. The opinion shows the case. The plaintiff had judgment below.

W. A. Quarrier, for appellant.

Miller & Gallaher and *Smith & Knight*, for appellee.

GREEN, J. [Omitting other matters.] The fourth assignment of error is that the court erred in admitting parol evidence and the record of the Powhatan Circuit Court to make certain what was not made certain by the defendant's letter, relied on to take the case out of the statute and to identify the debt referred to in this letter. This is the main objection urged to the action of the court below; and if it can not be sustained, there is no error in the record of which the plaintiff in error can complain. The position taken by the counsel of the plaintiff in error is, that if the bar of the statute is sought to be removed by proof of a new promise in writing, such promise must be clear, explicit, unequivocal and determinate, and if any conditions are annexed, they must be proven to have been performed; and if an acknowledgment is relied upon to take a case out of the statute of limitations, it should be a direct acknowledgment of a subsisting debt from which an implied promise may be fairly inferred. These positions are sustained by the authorities referred to by the counsel of the plaintiff in error. *Bell v. Morrison*, 1 Pet. 351; *Moore v. Bank of Columbia*, 6 id. 86; *Bell v. Crawford*, 8 Gratt. 110; *Tazewell v. Whittle's Adm'r*, 13 Gratt. 329; *Aylette's Ex'r v. Robinson*, 9 Leigh, 45.

These authorities do not sustain the position that extrinsic evi-

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dence, parol or written, can not be received to make certain the debt, which defendant has acknowledged in writing without specifying the amount or date of the debt. On the contrary, in *Bell v. Crawford*, 8 Gratt. 117, Judge MONCURE says: "It was not necessary that the amount of the debt should have been specified in the letter. The particular debt, to which the letter refers, may be identified by extrinsic evidence." This position of Judge MONCURE is sustained by the authorities. See *Lechmere v. Fletcher*, 1 C. & M. 631; *Bird v. Gammon*, 3 Bing. N. C. 883 (32 E. C. L. 368); *Waller v. Lacy*, 1 Mann. & G. 54 (39 E. C. L. 349), *Gardner v. McMahon*, 3 Ad. & El. (N. S.) 561 (43 E. C. L. 867); *Cheslyn v. Dalby*, 4 You. & Coll. 238 (9 M. & W. 633); *Barnard v. Bartholomew*, 22 Pick. 291. It may be added that the date also of the debt acknowledged in writing by the defendant may be supplied by parol evidence. *Edmonds v. Downes*, 2 C. & M. 458.

The only question remaining to be determined is, does the evidence in this case show, first, an acknowledgment by the defendant of the debt in writing, and whether this acknowledgment is a direct acknowledgment of a subsisting debt, from which an implied promise to pay it may be fairly inferred; and secondly, is the debt, if so acknowledged, made certain by extrinsic evidence either parol or in writing? Our statute (see Code of W. Va., p. 548, ch. 104, § 8) provides that "no promise except by writing as aforesaid shall take a case out of the operation of the statute. An acknowledgment in writing as aforesaid, from which a promise may be implied, shall be deemed to be such promise within the meaning of this section." We have seen that no promise can be implied from any acknowledgment except a direct acknowledgment of a subsisting debt; and we may add that such implication cannot arise, if it appears from the writing, that though the debt was directly acknowledged, yet this acknowledgment was accompanied by expressions which showed that the defendant did not intend to pay it, and did not intend to deprive himself of the right to rely on the statute of limitations; for under such circumstances no promise of payment can be fairly implied. Thus in *Moore v. Bank of Columbia*, 6 Pet. 90, a witness proved that he casually overheard a conversation between the defendant, who was drunk, and two of his drinking companions, who were bantering him about his independent circumstances and about his being so clear of debt and of the banks. The defendant, being drunk, jumped up and danced

about the room and exclaimed : “ Yes, except one damned \$500 in the Bank of Columbia, which I can pay at any time.” It was decided that this did not remove the bar of the statute, though the promise or acknowledgment was not then required to be in writing. So the bar of the statute was held not to be removed by a letter, which said, “ though I do not deny it, I do not promise to pay it ; whether I will promise, and what species of payment I will make, I reserve for further consideration.” *Morrell v. Frith*, 3 M. & W. 403 (34 E. C. L. 373). So a promise cannot be inferred from a writing, when it is clear that the meaning of the defendant was not to render himself personally chargeable but to inform the plaintiff of trustees with funds to pay the debt. *Whippy v. Hillary*, 5 C. & P. 209 ; 3 B. & Ad. 399 (23 E. C. L. 103). So a writing charging a reversionary interest, when the same should come into possession, would not be regarded as such an acknowledgment as would subject the party to a suit for a debt barred by the statute. See *Martin v. Knowles*, 1 Nev. & M. 421 (28 E. C. L. 327). But on the other hand a letter may amount to an acknowledgment of the plaintiff’s demand and a promise to pay it, though it points out a source of payment, when it does not confine the creditor to the source indicated ; as where besides expressing a hope that money from a certain source will end the delay in payment, it in effect says that at all events the debt must be ultimately redeemed. *Bird v. Gammon*, 3 Bing. (N. C.) 883 (32 E. C. L. 366).

In the case before us the letter relied upon to remove the bar of the statute of limitations was as follows :

“ CHARLESTON, *September 9, 1871.*

“ MY DEAR FRIEND :—Your letter from Richmond reached me this morning. If you knew the struggle I have had since the war you would not think hard of me, or strange in me, for not paying you all I owe you. It is needless for me to give you a detail. You are not my only creditor by a good deal, and my bread and meat debts I have had to pay first. If I had any money over and above this, I would send it to you without solicitation. I have land, the taxes on which amount to full \$100 a year. If I don’t pay I lose the land. I have been at the bar about two years ; a lawyer has to wait for his fees ; mine are beginning to come in, and as fast as I get money it goes in payment of what I owe. I will never keep a \$100 in my pocket as long as I owe a just debt, and never have.

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On my honor, you shall be paid as I get the money over and above my bread and meat. I can do no more. I have just returned from Washington where I went to get a patent for some machinery, etc. This will make me rich very soon. The first money I get from any source I will send you. I have contracted to sell some land in November next. If I get the money, I will then pay you. If I succeed in my machinery, I will do for you a great deal. I cannot doubt my success. If I give bond and it fall into another's hands it may ruin me, and in the end be of little benefit to you ; for if my credit is lost, I am lost. You may rely upon it, that I know better how to get means to pay you than you can suggest. I have acknowledged the debt to you in my letters again and again; therefore it stands as good as if you had my bond. Trust to my honor and good faith and your kindness to me will yet be your salvation. Upon this you may rely.

“ Your friend,

“ JOHN S. SWANN.”

Though this letter points out a source of payment, yet it obviously does not confine the creditor to the sources indicated. It certainly in effect says that in any event the debt must be paid. I can give no other meaning to the words “ I have acknowledged the debt to you again and again, therefore it stands as good as if you had my bond.” He certainly intended not only to acknowledge the debt, but also to expressly waive his right to claim the benefit of the statute of limitations; and from such an acknowledgment and such expressions a promise to pay the debt may be fairly implied.

[Omitting a discussion as to sufficiency of the proof of identity.]

Judgment affirmed.

JOHNSON and HAYMOND, JJ., concurred.

NOTE BY THE REPORTER.—See *Norton v. Shepard*, 48 Conn. 141; s. c., 40 Am. Rep. 157; *Elder v. Dyer*, 26 Kans. 604; s. c., 40 Am. Rep. 820.

In *Denny v. Marrett*, Minnesota Supreme Court, August, 1882, the debtor wrote as follows : “ I have had two communications from C. M. McCollough, Esq., in regard to our business affairs. At present, George, I am not able to offer any settlement. It will not be necessary for you in the future to employ an attorney to arrange this matter. When that is done it will be done with you direct, and not through any third party. I am very sorry indeed, George, that I am not amply able to pay you ; but hope on, dear boy. Hope springs eternal within the human breast ; and without it we could not live.” “ I will now write you and express my deep regret at the annoyance our business relations have caused you. In fact, the note which you have paid and hold is not my legitimate debts but our friend Sam. B. Ford, Jr. In explanation S. B. F. and myself had some dealing

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in which he gave me his note for \$235, I think. I had the same discounted. It was never paid, but renewed once or twice, and the last time the bank refused to renew without a new and more responsible indorser, and inasmuch as I was unable to pay it, I got you to indorse it with me. Now, George, I want you to present these facts to Sam, and try to get a compromise with him. I will try to do a portion of it, but in fact, the matter belongs to him exclusively. After you have interviewed him, please write me the result." The court said: "The statute of limitations does not operate to raise a presumption of payment, but is a statute of repose; hence to revive a legal obligation once terminated by the effect of the statute requires something more than a mere acknowledgment that a past debt is still unpaid. In *Whitney v. Reese*, 11 Minn. 133 (Gil. 87), this court laid down this rule as established by the modern decisions, viz., that there must, in such case, be 'either an express promise or an acknowledgment expressed in such words and attended by such circumstances as give to it the meaning, and therefore the force and effect, of a new promise. And in the case of an acknowledgment or implied promise there should be a direct recognition of the indebtedness sued on, from which a willingness to pay the same may be reasonably implied.' In *Brisbin v. Farmer*, 16 Minn. 215, the court says: 'An admission of indebtedness, to take the case out of the statute, must be such as reasonably leads to the inference that the debtor intended to renew his promise to pay.' We reaffirm the rule thus indicated. Tested by it, this case does not show the bar of the statute removed, either by a new promise to pay the debt or by such an acknowledgment of an existing debt or obligation as reasonably leads to the inference that the debtor intended to renew his obligation or to waive the benefit of the statute. There is certainly no express promise, unless it be in the words, 'I will try to do a portion of it.' How much? The question suggested shows that this is not a promise upon which an action can be maintained for the recovery of the whole debt, nor for any definite part of it. It is not a promise to pay any thing. There is nothing in these communications which to our minds indicates an intention on the part of the defendant to renew the obligation to pay, which the statute had put to rest, or to relinquish the benefit of the statute. On the contrary, they seem studiously to avoid the expression of any such purpose."

 MCGRAW V. BALTIMORE AND OHIO RAILROAD COMPANY.

(18 W. Va. 361.)

Carrier — responsibility for freezing of goods — act of God.

On the 13th of February, at Parkersburg, B. delivered potatoes to a railway company for transportation to Grafton, in time to be shipped on the 14th. There was a daily train between those points. They did not arrive until the 16th, and were then frozen. The weather was mild on the 13th and 14th, but freezing on the 15th and 16th. *Held*, that the railway company was liable for the damage.*

ACTION to recover the value of potatoes. The opinion states the case. The plaintiff had judgment below.

* See *Am. Ex. Co. v. Smith* (33 Ohio St. 511), 31 Am. Rep. 561, and note, 567.

McGraw v. Baltimore and Ohio Railroad Company.

C. Boggess, for plaintiff in error.

James Morrow, Jr., for defendant in error.

PATTON, J. This was an action at law brought in the Circuit Court of Taylor county by Thomas McGraw against the Baltimore and Ohio Railroad Company, to recover the value of fifteen barrels of potatoes shipped by J. G. Blackford of Parkersburg, to the plaintiff at Grafton, which were so frozen when they reached Grafton as to be worthless, when the plaintiff refused to receive them. The action was commenced on the 28th day of June, 1868, and the cause was tried on the 11th day of September, 1877, when there was judgment for the plaintiff for the sum of \$114.07 entered upon a demurrer to the evidence by the defendant, the Baltimore and Ohio Railroad Company. The company obtained a writ of error and *supersedeas* to this court.

By the evidence it appears that on the 10th day of February, 1866, Thomas McGraw by letter ordered from J. G. Blackford, at Parkersburg, some potatoes to be sent to him at Grafton; that the distance from Parkersburg to Grafton was one hundred and four miles; that there was a daily way freight train between those points leaving Parkersburg at about four o'clock A. M. and arriving at Grafton about four o'clock P. M., or according to the testimony of one witness, leaving Parkersburg from six to nine A. M.; according to another witness the custom and usage of the company at Parkersburg was to receive no goods for shipment on the following day after three o'clock P. M.; the goods received prior to three o'clock P. M. one day it was understood were to be transported as early the next day as practicable.

J. R. Murdoch testified that he was in the employ of J. G. Blackford, and as directed by the said Blackford he shipped to Thomas McGraw at Grafton fifteen barrels of potatoes on the 14th day of February, 1866, "fifteen barrels were shipped from Parkersburg to the said McGraw on the 14th of February," having been delivered to the Baltimore and Ohio Railroad Company, and the said company having receipted to the said Blackford for them; the said potatoes were shipped in good order, the weather at the time being safe and sufficiently warm to make the shipment prudent; the weather during the month of February was quite changeable, but at the time of the shipment was just as stated, warm and safe; the weather

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was changeable, so much so as one day to be quite warm and next very frosty and freezing, and it may have grown colder the day following the delivery of this; I am not positive."

It also appears by the evidence that the 15th and 16th of February were cold, freezing days; the potatoes were received at Grafton on the evening of the 16th of February so frozen as to be worthless. The dispatcher of trains testified that the day before they reached Grafton, whether in the evening or morning he could not remember, McGraw came and inquired for the potatoes; that trains arrived on time on the 15th and 16th of February. An engineer of a freight train testified that there was no train from Parkersburg to Grafton on the 13th or 14th of February; that at the instance of the agent at Grafton he looked at the register and found there was no train one of those days, but could not remember which day it was, the 13th or 14th, it might possibly have been the 15th.

Under these facts and upon the demurrer to the evidence, was the Baltimore and Ohio Railroad Company liable for the loss of these potatoes? The liability of a common carrier at common law for the loss of or damage to goods received for carriage from whatever cause arising except the act of God or the public enemy, or the conduct of the owner of the goods, is settled, unless that loss or damage arises from the nature and inherent character of the property carried, such as the natural decay of perishable articles, or the fermentation or evaporation of articles liable to these effects, or the natural and necessary wear of certain articles, or from defects in the vessels or packages in which they were put, or in the case of live stock, where the loss arises from their own vitality, or where vicious and unruly animals injure or destroy themselves or each other, or starve themselves by refusing food, or die of fright or heat, provided the common carrier has used foresight, diligence and care to avoid such damage and loss. *Smith v. New Haven & Northampton Railroad Co.*, 12 Allen, 533; *Clarke v. Rochester & Syracuse Railroad Co.*, 4 Kern. 571; *Cragin v. New York Central Railroad Co.*, 51 N. Y. 61; s. c., 10 Am. Rep. 559; *Conger v. Hudson River Railroad Co.*, 6 Duer, 375; *Hall v. Renfro*, 3 Metc. (Ky.) 53; *Maslin v. B. & O. R. R. Co.*, 14 W. Va. 180; s. c., 35 Am. Rep. 748; *Friend v. Woods*, 6 Gratt. 189.

In the absence of a special contract it is the duty of the carrier of goods to transport them by the usual route proposed by him to the public and to deliver them within a reasonable time. When

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a carrier undertakes to convey goods, the law implies a contract that they shall be carried and delivered at the place of destination safely and within a reasonable time. *Empire Transportation Co. v. Wallace*, 68 Penn. St. 302; *Vicksburg & Meridian R. R. Co. v. Ragsdale*, 46 Miss. 458; *Denny v. New York Central R. R. Co.*, 13 Gray, 481.

It is claimed by the counsel for plaintiff in error that the loss of the property in this case was occasioned by the act of God, and that the company is not liable. It has been determined that "such an accident as could not happen by the intervention of man, as storms, lightning and tempests" (Lord Mansfield in *Forward v. Pittard*, 1 T. R. 27), "those losses that are occasioned by the violence of nature, by that kind of force of the elements, which human ability could not have foreseen or prevented, such as lightning, tornadoes, sudden squalls of wind" (*Friend v. Wood*, 6 Gratt. 195), "an extraordinary convulsion of nature" (id. 196); "a direct visitation of the elements, against which the aids of science and skill are of no avail" (id. 196); "physical causes which are irresistible, which human foresight and prudence cannot anticipate, nor human skill and diligence prevent, such as loss by lightning, storms, inundations and earthquakes and the unknown dangers to navigation, which are suddenly produced by their violence" (*McCall v. Brock*, 5 Strobb. 119), are the acts of God or inevitable accidents. It seems to me that freezing weather coming especially in that season of the year, when such weather may be expected, cannot be brought within the definitions above given of the act of God or inevitable accidents, which are in conformity with the definitions universally given of those phrases. *O'Connor v. Forster*, 10 Watts, 418; *Coope v. Young*, 22 Ga. 272; Sedg. on Dam. 357.

In the case of *O'Connor v. Forster* the defendant was sued for failure to transport grain from Pittsburg to Philadelphia according to contract. The transportation was prevented by the freezing of the canal. The defendant was held liable to damages. The only question discussed was as to the measure of damages. It was not pretended that the freezing of the canal presented any excuse. Sergeant, judge, in delivering the opinion of the court, says: "The defendants were bound by their contract to transport the wheat from Pittsburgh to Philadelphia, and have shown no legal excuse for refusing to do so. The question is, what is the measure of damages to be paid by a carrier for violating such a contract."

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If the question in this case depended solely on the question, whether the plaintiff in error was liable for the loss of the property from freezing, because that was an act of God, I should have no hesitation in saying that the liability existed. But on the other hand, if the question of liability rested simply upon the question, whether they were liable for the freezing of the property, having been guilty of no negligence or misconduct by which that injury resulted, I would have as little hesitation in saying that they were not liable ; not because the freezing was an act of God or an inevitable accident, but because of the exception to that principle on account of the nature and inherent character of the property and its liability to freeze. *Maslin v. B. & O. R. R. Co.*, 14 W. Va. 189 ; s. c., 35 Am. Rep. 748. But whenever the common carrier is exempt from liability, either because of the act of God or because of the nature and inherent character of the property and its liability to loss and damage, he must be free from any previous negligence and misconduct, by which that loss or damage may have been occasioned. For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. *Williams v. Grant*, 1 Conn. 487.

That previous negligence or misconduct, which makes the carrier liable for loss to property, must be immediately or proximately connected with the accident or loss. If it is remotely the occasion of the loss or damage, the carrier is not liable. He is answerable for the ordinary and proximate consequences of his negligence, and not for those that are remote and extraordinary, and this liability includes all those consequences which may have arisen from the neglect to make provisions for those dangers which ordinary skill and foresight is bound to anticipate. *Morrison v. Davis & Co.*, 20 Penn. St. 171 ; *Denny v. New York Central R. R. Co.*, 13 Gray, 481 ; *Railroad Company v. Reeves*, 10 Wall. 176.

In the case of *Morrison v. Davis* the goods were injured by a flood. The evidence showed that the canal boat, by which the goods were transported, was drawn by a lame horse. The result was that the boat did not make its usual speed. If it had, it would have passed the point, where the goods were injured, before the flood. It was held that the carrier was not liable, because the lameness of the horse was the remote and not the proximate cause of the injury.

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In *Denny v. New York Central R. R. Co.*, the goods were unnecessarily delayed on the way for six days at an intermediate point, and were then carried to their destination and placed in the depot of the company. It was held that the company was liable for any injury resulting from the delay in transportation, but that it was not liable for the injury done by a flood after the goods were placed in the depot; that the delay was merely the remote cause of the injury by the flood.

On the other hand, in the case of *Smeed v. Foord*, 1 El. & El. 602, the delay was in the delivery of a threshing machine with the knowledge on the part of the company, that it was needed to thresh wheat in the field. The grain was injured by rain, and during the delay had fallen in value. It was held, that the carrier was liable for the injury to the grain, but not for the fall in value.

The obligation of the common carrier is to transport the goods safely and within a reasonable time. What is a reasonable time is not susceptible of being defined by any general rule; but the circumstances of each particular case must be adverted to in order to determine what is a reasonable time in that case. But it may be said, that the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are to be considered in determining whether in the particular case there has been an unreasonable delay. *Vicksburg & Meridian R. R. Co. v. Ragsdale*, 46 Miss. 458. It is obvious that ordinarily the delay in shipping articles not liable to decay or damage, such as iron, wool, cotton, grain, and things of like character, not liable to be injured by a few days' delay, would be no test in a case where the delay of a day in transportation would result in loss or damage by reason of their nature and inherent character, such as live-stock, fish, oysters, fruits, vegetables and things of like character. In the one case there is nothing in the thing itself which would induce a prudent business man to anticipate injury from a temporary delay in transportation, whereas in the other case any prudent business man, from the nature of the thing itself, might reasonably anticipate loss or damage from delay. So the season of the year is an element to be considered, some articles, as some kinds of vegetables, being of that nature that at certain seasons of the year a brief delay would be harmless, whereas at another season of the year the delay would result in loss or damage.

[Omitting a discussion of evidence.]

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It seems to me the jury could fairly draw the inference from the facts that the property was delivered to the company on the 13th in time for transportation on the 14th. Treating this then as the true state of the facts, there seems to be no reason whatever given why this property was not shipped to its destination on the 14th of February, unless there was no train on that day, which may be inferred from the testimony. That would account for the failure, but would not excuse the company. If the potatoes had been carried on the 14th, they would have reached Grafton in proper condition, the 13th and 14th of February having been "warm and safe."

Was the company then liable for not delivering this property on that day? Taking the nature of the property into consideration, its liability to be injured by freezing weather, the distance from the point of shipment to the place of destination, the daily trains between those points, the favorable condition of the weather when the property was delivered, its liability to change at that season of the year, and the fact that at that particular time it was very changeable, I do not think that that care and diligence and foresight were exercised, which are incumbent upon the common carrier. Under the circumstances the company is liable for the loss of the property, the delay being the immediate and proximate cause of the loss.

[Omitting a question of pleading.]

I am of opinion to affirm the judgment of the court below, with costs and damages according to law.

Judgment affirmed.

The other judges concurred.

Moats v. Rymer.

MOATS V. RYMER.

(18 W. Va. 642.)

Witness — attorney as — evidence of interest.

When an attorney becomes a witness for his client in a suit which he is conducting for him, it is competent to show that he has an agreement with his client, entitling him to a retainer and a certain portion of the amount to be recovered.

ACTION for malicious prosecution. The opinion states the point. The defendant had judgment below.

R. S. Blair, for plaintiff in error.

C. J. Stuart for defendant in error.

PATTON, J. Henry Moats brought an action of trespass on the case for malicious prosecution in the Circuit Court of Ritchie county claiming \$10,000 damages against William M. Rymer. The case was tried by a jury and a verdict found for the defendant, upon which judgment was entered for him. From this judgment the plaintiff obtained a writ of error and *supersedeas* to this court.

Two bills of exceptions were taken during the trial. The first bill shows that one of the counsel of the plaintiff was introduced as a witness in his behalf, and on cross-examination was asked, how much fee he was to receive from the plaintiff, to which he replied "that he did not regard it as any of their business, that his contract with the plaintiff was in writing, that he would not give it up or detail its contents." Whereupon the defendant moved the court for a *subpœna duces tecum*, to be served on said witness returnable forthwith. In response to this writ the witness appeared and moved the court to quash the writ upon the ground that it was improperly awarded, because it was defective on its face, and because it called for the production of a private paper in which the defendant had no interest. This motion being overruled the witness produced the contract, which was read to the jury for the purpose of showing the witness's interest in the suit and to go to his credibility as witness. To the reading of this paper to the jury the plaintiff objected, but the court

overruled his objection and permitted it to be read. The contract showed that the witness as counsel in the case was to receive \$50 retainer, to be paid in twelve months, and in addition thereto one-half of the recovery in the case, but was not to be liable for any costs.

[Omitting an unimportant matter.]

The only question is, whether it was competent to ascertain the interest that this witness had in the result of the suit and whether that interest could be shown in the way it was.

The counsel for the plaintiff in error argues that this contract as to the fee comes under the rule of professional communications and confidence, which cannot be disclosed to the prejudice of the client's case. I do not so understand it; nor can it in any way affect the client's right to recover. What compensation he may choose to pay his attorney does not enter into the question at all. It would be incompetent testimony so far as it affected or was intended to affect the client, and as original evidence would clearly have been inadmissible. But I know no rule of law, when an attorney goes upon the stand as a witness, which exempts him from the rules applicable to all other witnesses for testing the interest which he has in the suit. Formerly one who had a pecuniary interest in the result of a suit was incompetent to testify at all; now by statute he may do so, and that interest goes to his credibility as a witness. To say in the case of an attorney that the rule shall not apply would be to make a distinction that would be productive of no good and would be founded upon no reason whatever. When he steps down from his place as attorney to take the stand as a witness, he must stand the test which is applied to all other witnesses; and his credibility is to be weighed in the same scales of interest in which that of all others is weighed.

Fortunately the books show very few cases in which lawyers have become witnesses for their clients. While there are some cases of an extreme character in which such practice is necessary, ordinarily it is much to be regretted that such a practice should exist or be encouraged. So reprehensible is the practice generally, that it has been much doubted, whether a lawyer is a competent witness for his client. Wharton's Law of Evidence, § 420. By the Roman law no attorney is permitted to testify as to a matter in which he is professionally employed. *Id.*, § 421, note. In 1 Greenl. Ev. (13th ed.), § 364, it is said: "In regard to attorneys it has in

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England been held a very objectionable proceeding on the part of an attorney to give evidence, when acting as advocate in the cause, and a sufficient ground for a new trial. But in the United States no case has been found to proceed to that extent, and the fact is hardly ever known to occur." But if a lawyer becomes a witness for his client, it is by no means clear that the professional privilege is not waived." Whart. Ev., § 583. In that section it is said: "Where however a party offers himself as a witness, it has been argued that he may be asked as to his communications to his counsel, if part of the case he undertakes to prove." *Vide*, §§ 479, 584, and note. If this be so, when the attorney is introduced by the client should not the same rule apply?

As to whether the interest of the witness was shown in a proper manner, it is laid down by the authorities, that there are two modes of showing this interest; but whether each is exclusive of the other, is not clearly settled. It may be shown by the examination of the witness or by evidence *aliunde*. If the evidence offered *aliunde* to show the interest is held to be inadmissible, the witness may be examined on his *voir dire*; and if the witness on his *voir dire* does not answer in such a way as to show his interest but leaves it doubtful, whether he is interested or not, evidence *aliunde* may be resorted to. 1 Greenl. Ev., § 423. It is a matter of discretion in the court at *nisi prius*, whether to require the production of a paper by *subpœna duces tecum*. *Amey v. Long*, 9 East, 473; 1 Camp. 14. In this case the exercise of this discretion could have been avoided by the answer to the question, what interest he had in the suit, which the defendant had an unquestionable right to ask. He might doubtless have been compelled to answer that question, but as he stated that that interest was embodied in a written contract, it seems to me to be clear that the production of that paper was proper. But whether it was or not, the plaintiff can not complain of the mode of producing it. I do not think the court erred in requiring the production of this paper and permitting it to be read to the jury, so far as the plaintiff is concerned.

[Omitting other questions.]

Judgment affirmed.

The other judges concurred.

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CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

COMAN V. THOMPSON.

(47 Mich. 28.)

Mortgage — on crops — possession.

A mortgage on a growing crop, the mortgagor remaining in possession, is invalid as against his grantee of the premises without reservation.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Corbin & Cobb and H. A. Shaw, for plaintiffs in error.

H. S. Maynard and E. A. Foote, for defendant in error.

GRAVES, J. This cause was before the court at a former term and was then remanded for a new trial. 43 Mich. 389. And it now comes up again after the trial so ordered. The subject of contention is a quantity of stacked wheat, being the yield of about ten

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acres, taken off in the summer of 1879. Thompson seized it by replevin and the jury have found in his favor. The vital question relates to the legal title. His right originates in a chattel mortgage given to him by Joseph Demmon, dated November 23, 1878, but not delivered until December 3, and not filed until the 24th of that month. The wheat was then growing.

On their part the plaintiffs in error deny that this mortgage created any interest, and contend moreover that the property in the wheat was vested in them by means of certain conveyances of the land. The chattel mortgage described the wheat as being on the north-east quarter of the south-east quarter of section one, in town two north, of range three west, in Eaton county. It seems that in 1872 one James Sumerix owned the premises and mortgaged the north thirty-seven acres to Horace J. Perrin and subsequently conveyed the entire forty acres to Demmon who went in and kept possession until about the 10th of April, 1879.

Perrin foreclosed the Sumerix mortgage by advertisement, and became purchaser thereon of the thirty-seven acres which the mortgage covered. The year of redemption was to expire November 2, 1878, and shortly before that time Thompson called on Demmon, who was unable to redeem and had abandoned all purpose of doing so, and bargained with him to be allowed to step in and get the land, and they agreed, as Thompson explains the matter in his testimony, that he, Thompson, should pay the mortgage amounting to about \$800 and "secure to Demmon the right of staying there—the privilege of staying upon this place a year and six months," Demmon undertaking to pay \$120 for such privilege and agreeing to secure the same by chattel mortgage on the wheat which was then on the ground. Thompson called on Perrin and obtained his stipulation to extend the redemption thirty days, which was subsequently enlarged to the 20th of December, 1878. Having made these several arrangements with Demmon and Perrin, he contracted the whole forty acres to Phillips to pay and satisfy a mortgage which Phillips held against him. By this agreement it was provided that the thirty-seven acres should be deeded directly to Phillips by Perrin, and finally that Phillips should also have a conveyance from Demmon in order to cover the residue of the forty acres, and it was a part of this transaction between Thompson and Phillips that the "privilege" that Thompson had promised Demmon should be secured to him.

Perrin deeded the thirty-seven acres as agreed about the 23d of November, and on the 3d of December Thompson procured Demmon to quit-claim the whole forty, and Phillips paid the agreed consideration. In regard to these deeds the record contains the following admission: "It is admitted by the parties that the title of the land upon which the wheat in question was growing at the time, passed to C. F. Phillips by virtue of the deeds; one from H. J. Perrin to C. F. Phillips and the one from Joseph Demmon and wife to C. F. Phillips, and there was no reservation of the wheat in either of these deeds." Coman is in privity with Phillips and his right is supposed to rest on the same ground. After the deed from Perrin, and at the time Thompson was proceeding to have Demmon give the other, Phillips signed and gave to Thompson at his request a paper writing to be passed to Demmon on the delivery of the deed to come from Demmon, and the object was to secure to Demmon the before-mentioned "privilege" to stay on the place. Thompson took the paper and called on Demmon. Phillips was not a party to this interview between Thompson and Demmon. It was on the 3d of December before referred to, and Thompson on receiving the deed from Demmon to Phillips delivered to the former this writing signed by Phillips. It is to be assumed that it followed the arrangement between Thompson and Demmon, as Thompson had explained it to Phillips in their negotiations. There seems to have been no dissatisfaction with its terms on any hand. It was on this same occasion that Thompson took the mortgage from Demmon on the parcel of wheat which was then growing on the place.

So much of this writing signed by Phillips as is now material is as follows: "And for a valuable consideration the said Phillips agrees that the said Thompson shall have control and possession of said land until April 1, 1880, at which time the said Phillips is to have quiet and peaceable possession of same; it being understood and agreed however that on account of said Thompson having guaranteed possession as above to one Joseph Demmon, the present occupant of said land, that in case said Demmon should leave said premises before said April 1, 1880, then said Phillips is to have possession. The said Joseph Demmon shall not assign or transfer this lease to any one. It is understood that the said Demmon shall have the privilege of sowing the orchard lot on said place next fall to wheat and divide the product of said crop. The said Phillips is to have one-third delivered in half-bushel, and it is

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further understood that the said Demmon shall pay the whole tax against said land for the year 1878." At the interview referred to of the 3d of December between Thompson and Demmon, when this paper was delivered to Demmon, he executed a brief one by which he promised to give up possession to Phillips on the 1st of April, 1880, but its delivery by Demmon is seriously disputed and the weight of proof seems to favor the conclusion that it remained in his hands until he left. But be this as it may, it is not perceived that it could aid Thompson.

There was still another paper introduced on that occasion. It was an undertaking by Thompson to Demmon relative to the latter's occupancy, and it contained a reference to the chattel mortgage. It was a distinct matter between them, and not an ingredient of the transaction to which Phillips was a party and cannot be incorporated therewith to affect the construction adversely to his interests. It is a separate fact to which he was not privy and can have no place against him. Indeed Thompson does not pretend that Phillips saw the document or knew of its existence.

Demmon of his own accord gave up possession to Phillips about April 10, 1879, and handed to him at the same time all the papers remaining with him bearing on the rights of the parties. And the inquiry arising is whether, as against Phillips, Thompson acquired by the chattel mortgage any legal right to the wheat.

Starting with the very proper concession in the record that the deeds passed to Phillips the legal ownership of the land, it must then be admitted further that the legal property in the wheat went with it, and remained in Phillips unless it was in some way reserved to Demmon or granted or assigned to him. It was not reserved to him by the deeds. That is acknowledged. The only remaining resort is to the paper writing signed by Phillips and above quoted. Did that instrument qualify the *prima facie* legal operation of the deeds and work a reservation of the wheat in Demmon's favor, or in case there was no reservation, did it apply and act by way of grant or assignment to him? The position of counsel is that it had the effect to reserve the legal right to Demmon; that is to say, that in securing the right to stay in possession eighteen months longer to the exclusion of Phillips, it served to continue and carry along Demmon's ownership up to the time of harvest. As matter of legal and not mere moral, or perhaps equitable consideration, this view encounters insurmountable objections.

The validity of the foreclosure title is not questioned, and that title was conveyed a week or more before this writing from Phillips was given, and for the same space of time before the chattel mortgage was delivered; and the transmission of that title must have involved the transfer of the legal title to nearly if not all the wheat. The record does not locate the crop on any precise spot and it cannot be assumed that it stood on any specific ten acres. It may have extended over the three acres not embraced by the Perrin deed or part way over it, or it may be that it did not touch it. Whatever may have been the fact in regard to the actual location of the crop, it is certain that a chief portion of it must have been on the thirty-seven acres deeded by Perrin. This was physically necessary. As that deed preceded the chattel mortgage and the paper given by Phillips, it took effect before they did, and no facts are shown to let in the doctrine of relation as against Phillips, admitting it to be applicable in principle, so far as to save the wheat from the operation of the deed. But this writing from Phillips carefully avoids the mention of any right to the growing wheat. Why was it? It was not overlooked. The subject of crops was present to the parties, and pains were taken to provide expressly for a future sowing of wheat and for the division of interest in it and also for the delivery of Phillips' share. And yet the only thing stipulated about, independently of taxes and crops to be put in afterward, was the possession of the place, and this possession was to be a mere privilege, and to be kept or not as Demmon should elect. The necessary inference would seem to be that the growing wheat was purposely not mentioned, and that the reason was that Phillips did not understand that he was to be deprived of it.

The effect of this provision relative to possession is no greater in cutting down the granting operation of the deed than it would have been in case it had been inserted in them. And if that had been done it would not have produced the conveyance claimed. For it must be acknowledged that in case a person deeds his farm on which he has growing wheat, and nothing is reserved except a privilege to stay on the place for a year or so with the right to put a specified field into wheat on shares, the legal title to the growing crop will follow the title to the land. The legal right to one will not be distinguishable from the legal right to the other.

No claim as we understand is set up that the property in the wheat was brought back to Demmon by grant or assignment, and no footing is perceived for any argument based on that theory.

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It is needless to discuss the question whether the paper signed by Phillips is not technically a lease. The point possesses no practical importance. For admitting it to be, within some strained definition, what may be called a lease, it could have no force as a grant or assignment of the growing crop previously put in. If as the present view assumes, the wheat passed by the deeds, the paper in question, though considered as a lease, did not retransfer it. The result is that Thompson not only failed in showing a legal title to the wheat, but made no case for the jury, and the plaintiffs in error were entitled to the direct charge to find in their favor which they asked for by their seventh request.

The judgment must be reversed with costs and a new trial granted.

Judgment reversed.

The other justices concurred.

BUTLER V. DUNCAN.

(47 Mich. 94.)

Contract — unconscionable.

A dissolute and inexperienced spendthrift, 25 years old, mortgaged all the real estate to which he was entitled under his father's will, for \$5,000, as collateral to his note for that amount, made up as follows: \$1,000 in cash; a due-bill of \$47 surrendered; \$199 interest credited on a previous mortgage; \$110.85 premiums paid on a life insurance policy assigned to the mortgagee; and \$556.75 retained to pay subsequent annual premiums thereon; and \$3,200 for a conveyance of 160 acres of land worth \$1,000. The mortgagee was familiar with the mortgagor's circumstances, and required him to buy the land as a condition of lending the money, although the mortgagor knew nothing of the land and had no use for it. *Held*, unconscionable, and that the land should be re-deeded, but that the mortgage should stand for the actual loans, indebtedness, advances and credits, if the insurance policy were re-assigned. (*See note, p. 718.*)

BILL of foreclosure. Cross-bill to compel discharge of mortgage. The opinion states the facts. The plaintiff in the original suit had judgment below.

Wisner & Speed and T. M. Crocker, for Butler.

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Moore, Canfield & Warner, for Duncan.

MARSTON, C. J. No extended discussion of the facts is deemed necessary in this case. The bill was filed to foreclose a mortgage given by Duncan, October 14, 1878, to complainant to secure the payment of a note for \$5,000 drawing ten per cent interest, payable semi-annually. The property covered by the mortgage was all the right, title and interest of Duncan in and to any real estate, situate in Michigan or elsewhere, which he acquired as heir at law or devisee under the last will and testament of his father William C. Duncan. Duncan appeared, answered and afterward filed a cross-bill, setting up substantially the same facts set forth in his answer and asking relief.

It appears that Duncan was a young man of dissolute habits, a spendthrift and of not much business experience. Although he had an income of \$100 per month from his father's estate, yet he seems to have been in want of money; he had previously borrowed from Mr. Butler, and early in October, 1878, made application for another loan. The first application was not entertained, but at a subsequent interview Butler informed him that he, Butler, owned 160 acres of land in Grand Traverse county, and that if he, Duncan, could use that land and would take it at \$3,200, he, Butler, would make the loan, but at the same time refused to do any thing further until Duncan would go and see the land and thus ascertain its character and value. Directions were given Duncan how to get to the land, and with a friend named Hill Duncan started, got as far as Grand Rapids, remained there a day or two, returned to Detroit and informed Butler they had seen the land, that it was satisfactory and that Duncan would take it. Thereupon a conveyance of this land was made to Duncan; a due-bill of Duncan's which Butler held for \$47 was surrendered up: a credit of \$199 interest upon a previous mortgage held by Butler was indorsed, and \$1,000 in cash was paid to Duncan. At the same time a policy of insurance upon Duncan's life was taken out and assigned to Butler, upon which the premium, \$110.35, was paid and \$556.75 was retained by Butler to pay annual premiums on such policy thereafter as the same should become due, thus making up the sum of \$5,000 for which Duncan gave his note and the mortgage in question to secure the same.

At the time of this transaction Duncan was about twenty-five years of age, and while there was an apparent fairness on the part

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of Butler, especially in requiring Duncan to examine the Grand Traverse lands, yet when we look into the entire matter we find it of so unconscionable a nature that a Court of Chancery could not lend its aid in enforcing it. The title to the Grand Traverse lands was defective and the value thereof was but little if any over \$1,000, Duncan knew nothing about the value of such lands, would not have known even had he examined them, and could have had no possible use for such lands except to raise money thereon, all of which facts were fully known to Butler. The security given by Duncan was ample, and why a policy of insurance should have been taken out and assigned to Butler we are at a loss to discover, and more especially the reason for Butler's retaining in his hands the full amount of five years' annual premiums, while at the same time he had included such sums in his mortgage note and was receiving ten per cent interest payable semi-annually thereon, although the money still remained in his own hands.

To state the transaction mildly, it was taking advantage of Duncan's weakness and anxiety, and under the guise of an apparently fair business transaction, exacting a usurious interest which a court of equity cannot sanction. In so far as the parties can be restored to their former position they should be, and the moneys received by Duncan he should pay with interest thereon as he agreed.

The decree below must be reversed, and one entered giving Duncan the right to reconvey to Butler the Grand Traverse lands; that Butler's mortgage be held good for the \$1,000 paid, the amount of the due-bill, and indorsement upon the previous mortgage debt, and the premiums paid upon the \$5,000 insurance policy, with interest thereon from the date of each payment, conditional however that Butler re-assign such policy to Duncan; and that if such sums are not paid within ninety days then that Butler proceed to sell the mortgaged premises. And the cause will be remanded to the court below to render and enforce a decree in accordance with this opinion, Duncan to recover costs of both courts.

Reversed.

The other justices concurred.

NOTE BY THE REPORTER.—See *Kelly v. Caplee*, 23 Kans. 474; s. c., 33 Am. Rep. 179, and note, 182. The following are the recent leading English decisions on the subject of "catching bargains." In all of these the absence of legal counsel to the provision was a point on which stress was laid.

Miller v. Cook, L. R., 10 Eq. Cas. 641. Defendant, a money lender, agreed with plaintiff, just of age and in financial trouble, to lend him £150 on his reversionary interest under his

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father's will, and exacted security for £200 with interest at twenty per cent, reducible to ten per cent for punctual payment, and advanced only £128, but claimed interest on the whole amount secured. *Held*, that the security should stand only for the amount actually advanced, with interest at five per cent.

Earl of Aylesford v. Morris, L. R., 8 Ch. App. 484. A money-lender advanced money to a nobleman twenty-two years old, an expectant heir and largely in debt, taking his acceptances, including interest exceeding sixty per cent. Action on the acceptances was restrained, and they were ordered to be surrendered on payment of the actual advances with five per cent interest.

Tyler v. Yates, L. R., 6 Ch. App. 665. One twenty-six years old accepted bills for his brother under age, charging his reversion therewith, and a money-lender advanced the funds, requiring the amount of a former bill accepted by the minor to be included and charging a large discount, each brother having part of the advances. *Held*, valid only for the sum actually advanced over and above the amount of the former bill, with interest at five per cent. This was put on the ground that the elder brother was never told that his younger brother was under no legal liability on the former bill.

Beynon v. Onk, L. R., 10 Ch. App. 349. One advanced to another, twenty-six years old, \$85 on a mortgage of £100 of his reversion of \$600, with a provision for interest at five per cent a month after default. The reversion fell in twelve years after. *Held*, that redemption might be made on payment of the amount advanced and five per cent interest. *JAMES, M. R.*, had said: "It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many judges." This was affirmed, *JAMES, L. J.*, saying: "This is a perfectly idle appeal. The appeal is dismissed with costs."

Clark v. Malpas, 4 DeG., F. & J. 401. A poor and illiterate man, between sixty and seventy years old, was induced to sell three cottages, worth from £156 to £360, for house-rent free, and 12s. weekly for life, and £100 on his death as he might appoint, with power to require £10 of it to be paid during his life, but without security for such payments and house-rent. *Held*, that the deed should be set aside and re-conveyance made.

In re Slater's Trusts, L. R., 11 Ch. Div. 277. Expectant heirs, abjectly poor, mortgaged their reversionary interest for £500 upon an advance of only £350. This was effectuated only for the amount advanced, although there was a subsequent deed reciting that the difference "was a fair and reasonable remuneration for the delay in payment until after the decease," etc. The court pronounced it "a grievously hard bargain," and pronounced the recital "palavering, insincere and dishonest."

Croft v. Graham, 2 DeG., J. & S. 155. A money-lender procured from an expectant heir, twenty-three years old, of irregular and extravagant habits, with an income of £180 a year, a warrant of attorney to enter judgment for £7,100, and to take out execution for £3,500 with interest at five per cent per month. A settled account between the parties showed £3,000 due, and this included interest at that rate and more. Actual advances and interest at five per cent only were allowed. *Knight Bruce, L. J.*, said: "I am surprised at the appeal, and speaking respectfully, I am surprised at some of the arguments addressed to us on behalf of the defendant." The arguments in question were the following: "Why is the plaintiff to have money on terms on which he never expected to get it, and on which nobody would have lent it to him? The court can do no good by interfering with transactions of this nature. They are not like loans on security: they are speculations, the risk of losing the whole of the sums advanced being very great." "What rate of interest is reasonable depends on the risk." If such engagements are to be set aside, "persons in that position will be put upon still harder terms in borrowing, since the lenders must take into account the risk of a chancery suit."

Smith v. Kay, 7 H. of L. Cas. 750. During the last two years of his minority, Kay, having a life interest in real estate of £6,000 a year and £120,000 in the funds, had accepted bills to the amount of £53,000, for which he had received but some £23,000, and the day after coming of age he executed securities therefor. These were set aside. The other party was a solicitor, but the decision was not put on the ground of the fiduciary relation alone, but in part on the ground of the unconscionable nature of the dealings.

See *Earl of Chesterfield v. Janssen*, 2 Ves. 125; 1 White & Tudor's Lead. Cas. in Eq. (541).

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TORRENT V. COMMON COUNCIL OF MUSKEGON.

(47 Mich. 115.)

Municipal corporation — injunction against.

Unless forbidden by its charter, a city may not be enjoined from erecting a suitable city hall.*

BILL for injunction. The opinion states the case. The plaintiff had judgment below.

Henry H. Holt and Smith, Nims, Hoyt & Erwin for complainants.

Andrew B. Allen, city attorney, *James H. Campbell* and *M. Brown*, for defendants.

CAMPBELL, J. Complainants, who are considerable tax payers, obtained from the Circuit Court for the county of Muskegon, a decree restraining the city from putting up a building for the purposes of city offices and of the fire department. The claim of complainants, which seems to have been adopted by the court below, is that the building is more expensive than would be needed by the fire department, and that no power is given by the charter to build a city hall; and further that it could not be lawful to undertake such a large expenditure without the assent of the citizens by vote for that purpose.

If there is no power to build a city hall, or an edifice intended to subserve similar purposes, there is no power in the citizens to increase the functions of the council. Our attention has not been called to any provision in the city charter, authorizing any financial question to be submitted to the electors, except that of issuing bonds. Charter, §§ 66–67. That ground becomes wholly immaterial, and the question for us to determine is whether the facts of the case bring it within any rule to be drawn from the charter, allowing or forbidding the action in dispute.

The contract in question was made on the 17th of August of this year, and provides for a building for the use of the fire depart-

* See *Harrison v. City of New Orleans* (33 La. Ann. 223), 39 Am. Rep. 272.

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ment, and for city offices, to be finished March 15, 1882. The cost is to be \$15,371, payable in monthly installments. It involved the destruction and removal of a smaller engine-house already on the lot. The bill relies largely on the fact that the city will not have funds to pay it, and will thus be brought in debt.

This last consideration, standing alone, would not be one which we can properly pay much attention to. It is provided by the charter that the city may raise annually for its general purposes not more than seven per cent on the property assessable ; which at present rates would be about \$100,000. The contingent fund which receives this money is also entitled to the liquor taxes, and some other receipts, said to be not far from \$10,000 a year. This tax levy is under the discretion of the common council. It appears clearly enough that at the present rates of expenditure for public purposes the city may, if it chooses, raise money enough to pay for this expenditure, and that there is no controlling financial reason against it, if lawful.

But in saying this we do not assume that it belongs to this court or any other, to dictate to the city how it shall spend its money. The council must use its own discretion where it will save and where it will spend ; and the case must be a very clear one, and the subterfuge very plain, before that discretion can be regarded as having been exceeded so as to show an excess of power under a pretense of keeping within it. It is not the business of courts to act as city regulators, and unless the authority of the representatives of the citizens has been exceeded, their action cannot be interfered with merely because it may not seem to other persons to be as wise as it might be. We shall therefore confine ourselves to the question of power, merely adding, in view of the large range of the argument, that there is, in our opinion, nothing which indicates the slightest misconduct in the council, if they acted within their powers.

There is nothing said in the charter about any such building, by name, as a city hall, or city offices. There is power given expressly to build and maintain water-works, hospitals, markets and cemeteries. §§ 43, 91. Full power is given concerning a fire department. §§ 95 *et seq.* The council is authorized to take as well as to contract for private property, for — among other things — public grounds, parks, market places,—land necessary for public buildings and cemeteries. § 119, as amended in 1879, Local Acts, p. 201.

It is to be noticed in this connection, that prior to 1879 this

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section mentioned lands "for necessary public buildings," which in 1879 was changed to "land necessary for public buildings." This change is somewhat significant, as bearing on the discretion of the council.

The enumeration of most of these subjects enables us to see that the city of Muskegon has been empowered to do several important and expensive things, which are often left to private enterprise, and several others which cannot be said to be necessary in any absolute sense. The framers of the charter evidently thought that some respect was due to humanity, and to the necessities of civilized life, as understood by enlightened communities.

If cities were new inventions, it might with some plausibility be claimed that the terms of their charters, as expressed, must be the literal and precise limits of their powers. But cities and kindred municipalities are the oldest of all existing forms of government, and every city charter must be rationally construed as intended to create a corporation which shall resemble in its essential character the class into which it is introduced. There are many flourishing cities whose charters are very short and simple documents. Our verbose charters, except in the limitations they impose upon municipal action, are not as judiciously framed as they might be, and create mischief by their prolixity. But if we should assume that there is nothing left to implication, we should find the longest of them too imperfect to make city action possible.

We have had occasion several times to refer to the historical character of municipal institutions, and to the duty of courts to read all laws and charters in that light. Among other cases illustrating this necessity, we may refer to *People v. Hurlbut*, 24 Mich. 44; s. c., 9 Am. Rep. 103; *Attorney-General v. Lothrop*, 24 Mich. 235; *Stuart v. School District No. 1, in Kalamazoo*, 30 id. 69; *Attorney-General v. Burrell*, 31 id. 25.

If we examine into the usages of municipal bodies from the earliest times, we shall generally and almost universally find that in all cities and boroughs there have been from the beginning public buildings known as guild, town, or city halls, or by some equivalent name, devoted to none but municipal purposes. In those buildings the local courts and councils meet, and the documents are preserved, and the municipal business of all kinds is conducted. From the early settlement of this country the same usages have prevailed, and in many of the old towns of New England the municipal

building has always been preserved and maintained. The power to erect such buildings has seldom if ever been questioned in that part of the country, and it has frequently been referred to as an illustration of what may be regarded as public necessities. In *Stetson v. Kempton*, 13 Mass. 272, it was used for that purpose, to distinguish such powers from others. After referring to the meaning of the word "necessary" for municipal purposes, some instances are given which, the court say, "are necessary charges, because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town houses to assemble in, and market houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term *necessary*, for these may be essential to the comfort and convenience of the citizens. This case has been referred to since as setting forth the true doctrine on this particular subject. In *Willard v. Newburyport*, 12 Pick. 227, it was cited to sustain the legality of maintaining a town clock. In *Spaulding v. Lowell*, 23 Pick. 72, it was also referred to as sanctioning the building of market houses in the silence of the charter on the subject. This last case is the more significant as Lowell had already a town hall, and the market house was built with rooms for a court, and some other public purposes. It was held to come within the power to expend money for *necessary charges*,—the necessity being determined by fair municipal discretion. So also in *French v. Quincy*, 3 Allen, 9, it was held a town hall might be lawfully built with a view to future wants, and the use of portions not of present necessity might be made for other purposes, without violating a condition in the grant of the property that it should not be used for any other purpose than a town house. A somewhat similar view of the general doctrine is found in *Ketchum v. Buffalo*, 14 N. Y. 356.

The decision of this court in *Attorney General v. Burrell*, 31 Mich. 25, maintaining the power of a town to buy land for a common, contains a discussion bearing on the same subject. We need not multiply authorities on the matter.

The Constitution of this State, as has been pointed out in some of the decisions referred to, contemplates that the legislature shall create cities and other municipalities with full powers of beneficial legislation. The checks on extravagance are therein prescribed as to be found in limiting their powers of taxation and borrowing money, or incurring debts. Art. 15, § 13. When the legislature

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of the State prescribes the limits of financial action, it must be assumed to permit all reasonable and proper expenditures within those limits. Charters are, or at any rate should be, passed with a view to a long and growing progress.

If any reasons were necessary beyond ancient and general usage, they might be found in the manifest propriety of furnishing cities with official buildings of their own. They must either own or rent them, and it is not desirable to have the public convenience too much subjected to the chances of private action. If there were no other danger than that of inconvenience from unsuitable quarters, that alone is a serious mischief. But experience has shown that there is no security for public records where they are not kept by themselves in a safe and permanent repository. Loss by pillage or destruction, or by carelessness or forgetfulness, is of so common occurrence as to make the records of many of our communities very imperfect. And most cities and towns that have any pride in preserving the records of their past history find it an advantage in many ways to have permanent buildings with which their history is visibly connected.

We have not deemed it necessary to consider the questions bearing on the right of these complainants to vindicate public grievances. The experiment is ill judged on its merits. We also feel it our duty to refer to the danger of interfering in the outset of a case by injunction, with interests where delay may work great damage, without making full provision for redress by an adequate injunction bond. Defendants ought not to be subjected by the machinery of the law to irreparable mischief.

The decree should be reversed, and the bill dismissed, with costs of both courts.

Decree reversed.

The other justices concurred.

RUST V. CONRAD.

(47 Mich. 449.)

Specific performance — revocable contract.

Where a contract for a lease provides that the lessee may terminate the lease in whole or in part, on certain notice, *held*, that specific performance would not be decreed.

BILL for specific performance. The opinion states the case. The complainant had judgment below.

O. Clark and John A. Edget, for complainant.

Albert Crane, for defendant.

COOLEY, J. This is a bill for the specific performance of what is called in the mining districts a contract of option. The contract bears date July 1, 1880, and is given in full in the margin.

David W. Rust, one of the contracting parties, died intestate October 4, 1880, and when administrators were appointed they united with the heirs-at-law in transferring the interest of the estate to John F. Rust, Ezra Rust and George M. Stevens, and the assignees join with John J. McTavish, Myron E. David and Orrin J. David in filing the bill. The complainants allege the full performance on their part of all that was required to entitle them to exercise their option and demand a lease, and they also aver that they elected to take a lease, and demanded it December 3, 1880.

The defendants admit the making of the contract and the demand of the lease, but they deny the performance by complainants of the conditions precedent. They also rely upon two principles of law as constituting a complete bar to the relief claimed. These principles may be stated as follows :

1. The contract of option was a mere license to David W. Rust and his associates, and as such was personal and not assignable, and when David W. Rust deceased, the license was by implication of law revoked.

2. The contract was not such a one as a court of equity will specifically enforce. By its terms the lease to be given under it might at any time be terminated by the lessees, as to the whole land or any part of it not less than eighty acres, on their giving thirty

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days' notice of intention so to do. The continuance of the lease, if one should be given, would therefore depend on the will of the lessees, who might immediately elect to terminate it. The contract therefore lacks mutuality and equality ; and not being mutual or equal, lacks equity, and for that reason should not be enforced.

The first of these as a general principle is no doubt sound. Its application to this case might perhaps be disputed by complainants upon the ground that although the contract was with David W. Rust and his associates only, yet it provided for a lease that should be assignable. Whether they would be correct in this we shall not inquire, for the reason that it is unnecessary in this case, which must be governed by other considerations.

When a party to a contract appeals to a court for its specific performance, he addresses himself to the judicial discretion. The relief he asks is altogether exceptional, for the general rule is that the party who complains that another has failed to fulfill his engagements, is supposed to have adequate redress at law in recovery of damages. The court may therefore refuse to grant specific performance in any case where in its judgment equity does not require it. *McMurtrie v. Bennette*, Har. Ch. 124 ; *Smith v. Lawrence*, 15 Mich. 499 ; *Blanchard v. Detroit, etc., R. Co.*, 31 id. 43 ; s. c., 18 Am. Rep. 142 ; *Berry v. Whitney*, 40 Mich. 65 ; *Willard v. Tayloe*, 8 Wall. 557 ; *Williams v. Williams*, 50 Wis. 311 ; *Mather v. Simon-ton*, 73 Ind. 595. In a few cases a party is suffered to invoke this extraordinary jurisdiction of a court of equity, when it is manifest that the remedy at law is inadequate.

But when a party comes into equity it should be very plain that his claim is an equitable one. If the contract is unequal ; if he has bought land at a price which is highly inadequate ; if he has obtained the assent of the other party to unreasonable provisions ; if there are any indications of overreaching or unfairness on his part, the court will refuse to entertain his case, and turn him over to the usual remedies. *Chambers v. Livermore*, 15 Mich. 381 ; *Munch v. Shabel*, 37 id. 166 ; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643 ; *Burton v. Le Roy*, 5 Sawy. 510. If for example the contract is so drawn that the vendor has the option to retain the property or to convey it, performance in his behalf will be refused. *Maynard v. Brown*, 41 Mich. 298. And in each case the court will consider " whether, in view of all the facts and those doctrines which are interwoven with the very texture of equity jurisprudence,

and in view of the specific peculiarities presented and the settled principles and maxims of the court, it is right and proper to entertain the case and administer relief." *Buck v. Smith*, 29 Mich. 166, 170; s. c., 18 Am. Rep. 84. These are familiar principles.

But the court will also refuse to interfere in any case, where if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. A familiar instance is that of a contract for the formation of a partnership, which though it is within the power of the court to enforce it, and it may be done under special circumstances when by its terms the partnership is to continue for a definite period, yet in the absence of a provision to that effect performance will invariably be refused, though the terms be in all respects equal, fair and legal. The reason is that the partnership which the court might establish by its decree, the parties or either of them might immediately dissolve; and Lord ELDON says "no one ever heard" of the court executing an agreement under such circumstances. *Hercy v. Birch*, 9 Ves. 357. See also *Scott v. Rayment*, L. R., 7 Eq. Cas. 112; *Meason v. Kaine*, 63 Penn. St. 335; Coll. on Part. 19, 385; Story on Part., § 189; Pars. on Part. 298; Fry on Spec. Perf. 64, 504; Story Eq. Jur., § 666.

All contracts where the party has reserved to himself, or where the law gives him the authority to render nugatory any decree that ought to be rendered in their enforcement, rest upon the same principle. This was recognized in *Marble Co. v. Ripley*, 10 Wall. 339, 359; and more distinctly asserted and decided in *Express Co. v. Railroad Co.*, 99 U. S. 191. In this last case the very strong assertion is made that "a court of equity never interferes where the power of revocation exists."

[Minor matter omitted.]

It is urged on the part of the complainants that the recognition and enforcement of these contracts of option is absolutely essential to the development of the mineral resources of the State; and it may be and probably is the fact that they perform a convenient and

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useful function. But it does not follow from that fact that the party must have this specific remedy. He is supposed to rely upon his right to an action for the recovery of damages in all cases where it is not consistent with the principles of equity that he should have other redress. Denying specific performance does not deny the legality or obligation of the contract; it denies merely that the case is one of equitable cognizance.

The decree must be reversed and the bill dismissed with costs of both courts.

Judgment reversed.

The other justices concurred.

GOEBEL V. LINN.

(47 Mich. 489)

Contract — duress — novation — consideration.

In November, 1879, brewers contracted with an ice company for ice during the season of 1880 at \$1.75 a ton, or \$3 if the crop proved short. The crop failed, and in the next May the company notified the brewers that they would no further perform the contract. Thereupon the brewers, having a large amount of beer on hand liable to spoil, made a new arrangement with the company, agreeing to pay \$3.50 a ton, and received and paid for some ice at that rate, and gave their note for other ice at the same rate. *Held*, valid and enforceable.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Maybury & Conely and Fred. A. Baker, for defendants in error.

Jno. Atkinson and C. J. Reilly, for defendants in error.

COOLEY, J. The action in this case is upon a promissory note given by defendants, October 20, 1880, to the Belle Isle Ice Co., and by that company transferred to the plaintiffs after it fell due. The execution of the note is admitted, and the only question in the case is, whether the defendants have established any defense to it.

than rely upon their strict rights under the existing contract. What these reasons were is not explained to us except as above shown. It is obvious that there might be reasons that would go beyond the immediate injury to the business. Suppose, for example, the defendants had satisfied themselves that the ice company under the very extraordinary circumstances of the entire failure of the local crop of ice must be ruined if their existing contracts were to be insisted upon, and must be utterly unable to respond in damage ; it is plain that then, whether they chose to rely upon their contract or not, it could have been of little or no value to them. Unexpected and extraordinary circumstances had rendered the contract worthless ; and they must either make a new arrangement, or in insisting on holding the ice company to the existing contract, they would ruin the ice company and thereby at the same time ruin themselves. It would be very strange if under such a condition of things the existing contract, which unexpected events had rendered of no value, could stand in the way of a new arrangement, and constitute a bar to any new contract which should provide for a price that would enable both parties to save their interest.

We do not know that the conditions of things was as supposed, but that it may have been is plain enough. What is certain is, that the parties immediately concerned, and who knew all the facts, joined in making a new arrangement out of which the note in suit has grown. The case of *Moore v. Detroit Locomotive Works*, 14 Mich. 266, where a similar case was fully considered, is ample authority for supporting the new arrangement.

If unfair advantage was taken of defendants, whereby they were forced into a contract against their interests, it is very remarkable that they submitted to abide by it as they did for nearly eight months without in the meantime taking any steps for their protection. Whatever compulsion there was in the case was to be found in the danger to their business in consequence of the threat made at the beginning of May to cut off the supply of ice ; but the force of the threat would be broken the moment they could make arrangements for a supply elsewhere ; and there is no showing that such a supply was unattainable. The force of the threat was therefore temporary ; and the defendants, as soon as they were able to supply their needs elsewhere, might have been in position to act independently, and to deal with the ice company as freely as they might with any other

party who declined to keep his engagements. On any view therefore which we may take of the law, the defense must fail.

But if our attention were to be restricted to the very day when notice was given that ice would no longer be supplied at the contract price, we could not agree that the case was one of duress. It is not shown to be a case even of a hard bargain ; and the price charged was probably not too much under the circumstances. But for the pre-existing contract the one now questioned would probably have been fair enough, and if made with any other parties would not have been complained of. The duress is therefore to be found in the refusal to keep the previous engagements. How far this falls short of legal duress was so recently considered by us in *Hackley v. Headley*, 45 Mich. 569, that further discussion now would serve no valuable purpose. In that case there was a dispute respecting the amount of a debt. The debtor refused to pay unless the creditor would accept in full the amount conceded by him to be owing. The creditor insisted that a large sum was due him, but being in immediate need of money, the circumstances were such that he felt compelled, as he claimed, to accept the sum offered. Afterward he repudiated the arrangement, as having been made under duress. This court on a careful examination of the authorities found no support for the claim in legal principles. The following language made use of in disposing of the case is not without relevancy here ; “In what did the alleged duress consist in the present case ? Merely in this : that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done any thing to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress then is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff’s claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits ; and the validity of negotiations, according to this claim, must be determined, not by the defendant’s conduct, but by the plaintiff’s necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper.

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But this would be a most dangerous, as well as a most unequal doctrine ; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need."

We are of opinion that the defense failed, and that the judgment should be affirmed with costs.

Judgment affirmed.

The other justices concurred.

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(47 Mich. 576.)

Negligence — of druggist — contributory.

In an action against a druggist for injury by negligence of his clerk in selling sulphate of zinc for Epsom salts, it is no defense that the medical treatment was negligent, but a charge that the defendant is liable without regard to negligence or legal fault is error.

CASE. The opinion states the facts. The plaintiff had judgment below.

J. W. & O. C. Ransom, for plaintiff in error.

Hughes, O'Brien & Smiley, for defendant in error.

COOLEY, J. Marshall sued Brown in case to recover damages for a negligent injury. The facts which she claims to have established on the trial and on which she relied for a recovery are, that in February, 1876, being confined to her bed by illness, at her home in Grand Rapids, and desiring to take sulphate of magnesia or Epsom salts, as a medicine, she sent her sister to the store of defendant, who is a druggist in the same city, to procure the salts for her ; that her sister called for ten cents' worth of Epsom salts, and was waited upon by one Adsit, a clerk of defendant, who delivered to her what he said was the article she called for, remarking at the time, in explanation of an unusual appearance, "It is pure salts, but it is a little dark from exposure ;" that the article

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was taken to plaintiff, who dissolved the same in water and took a portion thereof; that she immediately felt a burning sensation and was very sick, and suspecting something wrong, remedies were at once given as for poison; that what remained of the article she had thus procured was afterward examined and found to be sulphate of zinc, or white vitriol; that the delivery of this to her sister in response to her call for Epsom salts was through the gross negligence of defendant's clerk Adsit, and that she was seriously and permanently injured in health thereby.

[Omitting minor considerations.]

The only assignments of error that seem to us to require much attention relate to the charge of the judge on the question of negligence. The defendant insisted that the subsequent treatment of the plaintiff with a view to relieve her of the drug was improper and well calculated seriously to injure her, and he relied upon this treatment as evidence of contributory negligence. It appeared that eggs, milk, sweet oil, brandy and warm water were administered for the purpose of producing vomiting, and the judge instructed the jury as follows: "If you should find from the evidence in the case that the giving of large quantities of eggs, milk, sweet oil, brandy and warm water was the cause of long and continued vomiting, and that said vomiting was the cause of the injury or injuries claimed to have been suffered by the plaintiff, and if you find from the evidence that such treatment was improper, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

The defendant was not satisfied with this instruction, and requested that the following should be given:

"If you should find from a preponderance of evidence in the case that the drug or medicine alleged to have been given to the plaintiff was in fact white vitriol, and you should also find that the same was purchased at the defendant's store, and put up by his agent for and as Epsom salts, and that said drug so purchased was administered to the plaintiff, and that the plaintiff, her nurse or physician, were more or less negligent in administering the same, or in taking care of said plaintiff, and in their treatment of her immediately after said drug had been administered, and that such carelessness or negligence of the plaintiff, her nurse or physician, or any person in charge of her, caused or contributed to the injuries alleged to have been sustained—provided you find that any were

sustained — then the plaintiff cannot recover in this action and your verdict should be for the defendant.

“If you find from the evidence in the case that white vitriol was in fact sold by the agent of the defendant to the plaintiff, and that the plaintiff took an overdose of the same, yet unless you also find that the injury or injuries claimed to have resulted to the plaintiff were caused solely from the taking of such overdose of white vitriol, and were not caused by improper treatment of plaintiff immediately thereafter by her physician or attendant, plaintiff cannot recover in this action, and your verdict should be for the defendant.

“If you find from the evidence in the case that white vitriol was in fact sold by the agent of the defendant to the plaintiff, and that the plaintiff took an overdose of the same, yet unless you also find that the injury or injuries claimed to have resulted to the plaintiff were caused solely by the taking of such overdose, and were not contributed to or increased by improper treatment of plaintiff immediately thereafter by her physician or attendants, plaintiff cannot recover in this action, and your verdict must be for the defendant; for you must not only be satisfied from the evidence in the case that white vitriol was in fact sold and administered to plaintiff in an overdose so as to make it poison, but you must also be satisfied from the evidence that such injury or injuries—if you are satisfied that any were sustained—were the result of the taking of such overdose, and were not contributed to or increased by such improper treatment; for if such injury or injuries resulted from the mutual fault of the defendant and plaintiff, the law will neither cast all the consequences upon the defendant, nor will it attempt to make any apportionment thereof, and the burden of proof is upon the plaintiff to show that the defendant is wholly in fault.”

These three requests were refused. On a careful examination of them it is apparent that they do not direct the attention of the jury to supposed contributory negligence of the plaintiff, her agent, physician, nurse or attendant, in the purchase of the drug, or in the administration of the same to the plaintiff. It is not suggested that there was any negligence on the part of the plaintiff, or on the part of any other person for whose conduct she is to be held responsible, until after the drug was administered, or until means were resorted to for the purpose of preventing injurious consequences. Neither is it suggested that the negligence of the defend-

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ant — if it was established to the satisfaction of the jury — did not, independently of any negligence of the plaintiff or of any one whose negligence is to be imputed to her, produce some injury to the plaintiff which might support an action had there been no subsequent negligence. What the requests do suggest is, that if the defendant causes an injury to the plaintiff, and the plaintiff afterward increases the injurious consequences by his own fault or the fault of his agents or servants, this blameworthy contribution to the injury takes away any right of action for the defendant's fault which otherwise would have existed. The contributory negligence then comes in, not to prevent a cause of action arising but to discharge one that has already arisen.

No such doctrine is consistent with good sense or sound law. A tort arises when there is a thing amiss with resulting damage. If the drug was negligently sold, as is charged in this case, and was subsequently taken by the plaintiff without fault on her part or on the part of any one whose act in administering it is to be imputed to her, these facts constitute that necessary concurrence of wrong and damage which will support an action. It is not necessary to inquire into the subsequent treatment of the case in order to determine the question of legal wrong. A heedless attendant cannot release the defendant from his responsibility by neglecting his own duty, nor can the physician do so by treating the case improperly. But the question of the extent of the injury which is traceable to the defendant's negligence is another matter altogether. To judge of that it is necessary to inquire into the care and treatment which the plaintiff subsequently received. If it shall appear that the injury to plaintiff's health is traceable not to the drug itself, but to improper treatment or want of due care after it was taken, it will then be obvious that the plaintiff's injury at the hand of the defendant is merely nominal. The question will then become one of damages only, and must be disposed of by the jury.

The Circuit judge therefore did not err in refusing these instructions. *Wilmot v. Howard*, 39 Vt. 447 ; *Hathorn v. Richmond*, 48 id. 557. He had already gone far enough, if not too far, in the same direction, in the instruction he had given. There are cases having some resemblance to this in which such instructions might be proper, but the distinction is sufficiently obvious on a moment's consideration. A case of alleged malpractice is an illustration. A patient sues his physician for injuries consequent upon unskilful or negli-

gent treatment of his case, and the physician defeats his action by showing that the patient's own negligence contributed to the injury. *Hibbard v. Thompson*, 109 Mass. 286 ; *Geiselman v. Scott*, 25 Ohio St. 86 ; *Potter v. Warner*, 91 Penn. St. 362 ; s. c., 36 Am. Rep. 668. But in such a case the negligence of the patient comes in to qualify, affect and change the treatment of the physician in which the negligence is to be found, and a remedy is denied for the reason that the two, by the act of the patient himself, were combined in the very facts on which he relies to show his injury.

On the subject of what is to be deemed negligence in the defendant which will support an action, we are constrained to say the Circuit judge, if his charge is correctly given in the record, was not consistent with himself, and in one of his instructions not accurate. He first told the jury that to entitle the plaintiff to recover they must find that Adsit, the clerk, was careless in the delivery of sulphate of zinc instead of sulphate of magnesia, and that he did not exercise that degree of care which his duty and the business he was engaged in required of him. He was requested to instruct them that negligence was established by proof of the fact that the one article was put up and delivered when the other was called for ; but this he declined.

The record shows however that after the jury had received their instructions and consulted together for a time, they returned into court and requested further instructions on certain points. This gave the parties opportunity for other requests and some were given and some refused. As to what would constitute negligence in druggists, the judge gave the following : " It is the duty of druggists to know the properties of the medicines which they sell, and to employ such persons as are capable of discriminating and dealing out according to prescription ; and if the defendant's clerk in this case sold and delivered to plaintiff a poison instead of a harmless drug, and the plaintiff took it supposing it to be harmless, and was thereby caused a suffering and a serious injury, the defendant is liable for all damages so caused in this suit."

In this instruction there is no hint of negligence as a necessary element in the right of action. The duty is correctly stated, and it is assumed that a right of action will arise from a failure to perform it, irrespective of the reasons. If the judge is wrong in this the judgment cannot stand ; for though there are other instructions which seem to be inconsistent with this, we cannot know that the jury did not shape their action by this rather than by any other.

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The question then is whether the delivery at a drug store of a deleterious drug to one who calls for one that is harmless, and a damage resulting therefrom, will not merely tend to make out a right of action, but of themselves give a right of action even though there may have been no intentional wrong and the jury may believe there was no negligence.

That such an error might occur without fault on the part of the druggist or his clerks is readily supposable. He may have bought his drugs from a reputable dealer in whose warehouse they have been tampered with for the purposes of mischief. It is easy to suggest accidents after they come to his own possession, or wrongs by others of which he would be ignorant, and against which a high degree of care would not give perfect protection. But how the misfortune occurs is unimportant, if under all circumstances the fact of occurrence is attributable to him as legal fault.

The case, it must be conceded, is one in which a very high degree of care may justly be required. People trust not merely their health but their lives to the knowledge, care and prudence of druggists, and in many cases a slight want of care is liable to prove fatal to some one. It is therefore proper and reasonable that the care required shall be proportioned to the danger involved. But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred.

In the leading case of *Thomas v. Winchester*, 6 N. Y. 397, where a druggist carelessly labelled a poison as a harmless medicine and sold it accordingly, his liability for the consequences was expressly grounded upon actual negligence. So it was in *Norton v. Sewall*, 106 Mass. 143; s. c., 8 Am. Rep. 298, which follows the case in New York.

In *Fleet v. Hollenkemp*, 13 B. Mon. 219, a druggist in compounding a medicine, ground the different ingredients in a mill which had been used for poisonous drugs and did not first properly clean it. They claimed to go to the jury on the question of due care, and under instructions that if they used due care, or at least if they used extraordinary and unusual care, they were not liable in a civil action. The Court of Appeals justly say: "It is absurd to speak of degrees of diligence and of negligence as excusing or not excusing, or as settling the question of liability or no liability, in a case where the vendor of drugs, being required to compound

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innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground." In *George v. Skivington*, L. R., 5 Exch. 1, which was disposed of on demurrer, negligence was averred. It may seem a hard rule which throws upon the purchaser the consequences of a mistake by another, but it is the same rule which in other cases leaves the consequences of inevitable accident where they have chanced to fall. *Weaver v. Ward*, Hob. 134; *Bizzell v. Booker*, 16 Ark. 308; *Losee v. Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623; *Morris v. Platt*, 32 Conn. 75; *Gault v. Humes*, 20 Md. 297; *Burton v. Davis*, 15 La. Ann. 448. The judge therefore instead of submitting the mistake to the jury as something in itself necessarily constituting a cause of action, should have submitted it as matter of evidence on the question of negligence, of the cogency of which it was their right and their duty to judge.

The judgment must be reversed with costs and a new trial ordered.

Judgment reversed.

The other justices concurred.

DENISON V. SHULER.

(47 Mich. 593.)

Mortgage — on chattel for purchase-price — mechanics' lien.

A mechanics' lien for repairs of a chattel is subordinate to a prior duly recorded mortgage thereon for the purchase-money. (*See note, p. 737.*)

REPLEVIN. The opinion states the case. The defendant had judgment below.

Taggart, Stone & Earle, for plaintiff.

Huggett & Shriner, for defendant.

GRAVES, C. J. This is a case made after judgment. The plaintiff brought replevin for "one Ames' engine, No. 2,832, ten-horse power," and the officer took it from defendants on the writ

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and delivered it to the plaintiff. The action was tried without a jury and the Circuit judge found specially and determined that defendants were entitled to the amount of their alleged lien for repairs.

The plaintiff sold the engine to Canute and Bidwell and took back the mortgage set out in the finding to secure the purchase-money. This was on the 23d day of July, 1879. The mortgage was duly filed and was kept in force by regular renewals. The sum of \$650 still remains unpaid. The defendants are mechanics, and the engine requiring certain repairs to put it in condition for use, Canute & Bidwell delivered it to them for that purpose. This was in November, 1880, and between that time and the 19th of January following they made repairs which involved labor and materials to the sum of \$185.86. This money remained unpaid and the engine continued in the possession of the defendants. They took no active measures to enforce their lien. The plaintiff claimed possession on the mortgage, and they refused to give it unless on payment of their charges.

No question arises on the validity of the mortgage or of the lien. Both are assumed to be valid. The difficulty is that they are sought to be enforced in direct hostility to each other and one must necessarily give way, and the point is which shall take precedence. The Circuit judge ruled that the last should overreach the first.

The mortgage was on file and defendants were therefore affected with notice. On general principles it would seem that the lien so carefully reserved by the vendor, the person furnishing the entire original machine, ought to have priority over the subsequent repairers. The engine itself included all the labor and all the material necessary for its production, and when the plaintiff sold it he virtually furnished to his vendees that labor and those materials and preserved an express lien. The repairers did less. Their expenditure was comparatively small and they acted in making it under circumstances which charged them with notice of the plaintiff's prior lien. Why should their claim be preferred?

The principle, says Chief Justice MARSHALL, is believed to be universal, that a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a

subsequent claimant. *Rankin v. Scott*, 12 Wheat. 177, 179. The finding contains no act of the plaintiff postponing his mortgage to defendants' subsequent lien, and no ground of inference is seen of any authority in the mortgagors to subject the engine to a claim overriding his security. So far as the terms of the transaction import any thing on the subject they bespeak a purpose by the plaintiff to have and hold as security for the consideration of his sale, the first and immediate claim and lien on the very title which he granted. He did not intend that a subsequent incumbrancer should be let in to obtain a lien which would outrank his own.

The statutes directly relating to the subject, although somewhat vague, will not bear a construction adverse to the plaintiff. Comp. L., §§ 6823, 6824, 6825; amendments of 1873, vol. 1, p. 118. They mention the institution of the lien in case the property is delivered to the artisan by "any person;" but this general language was not designed to subject the interest of one individual to a lien through the delivery of another having no sort of connection with that interest nor any authority to affect it. Were the terms to be applied literally, the delivery by a thief would be sufficient. The words must have a reasonable construction and one which will cause them to operate consistently with the principles of justice and the general laws of property. Had it been intended that the kind of lien in question should operate retrospectively and override prior securities executed to secure purchase-money it is not to be supposed that the legislature would have left the purpose in any doubt.

The view to which these observations lead is, that the effect of the transaction between the mortgagors and the defendants respecting the repairs in question was to give a lien to the defendants on the equity or right of redemption, and subject of course to the plaintiff's mortgage. The lien did not apply to the plaintiff's interest, but was confined to that of the mortgagors. The plaintiff was entitled to have possession under his mortgage without paying defendants, and the latter were entitled, if they desired, to redeem against the mortgage.

There is some want of harmony in the cases, but the weight of authority on the state of facts in the record is believed to favor this conclusion. *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Sargent v. Usher*, 55 N. H. 287; s. c., 20 Am. Rep. 208; *Small v. Robinson*, 69 Me. 425; *Carrington v. Ward*, 71 N. Y. 360. *Hammond v. Danielson*, 126 Mass. 294, is the strongest case noticed for the view

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taken by the court below. But it does not appear whether statutory provisions had or had not any influence, and moreover the essential facts were not the same.

The judgment should be reversed and one entered here for the plaintiff with the costs of both courts.

Judgment reversed.

The other justices concurred.

NOTE BY THE REPORTER.—In *Hammond v. Davidson*, 126 Mass. 294, a hack, described as in use at certain stables, was mortgaged, and by the terms of the mortgage the mortgagor was to retain possession, and use and enjoy the same until default. While so in possession, the mortgagor had it repaired. *Held*, that the person making the repairs had a lien therefor as against the mortgagee.

GRAY, C. J., observed: "A lien on personal property cannot indeed be created without authority of the owner. *Hollingsworth v. Dow*, 19 Pick. 228; *Globe Works v. Wright*, 106 Mass. 207. But in the present case such an authority must be implied from the facts agreed. The subject of the mortgage is a hack, that is to say, a carriage let for hire; described in the mortgage as 'now in use' at certain stables; and which, as the parties have agreed in the case stated, the mortgagor retained possession of and used agreeably to the terms of the mortgage. It was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt. The case is analogous to those in which courts of common law, as well as of admiralty, have held, upon general principles, independently of any provision of statute, that liens for repairs made by mechanics upon vessels in their possession take precedence of prior mortgages. *Williams v. Allsup*, 10 C. B. (N. S.) 417; *The Solo*, L. R., 1 Adm. & Eccl. 263, 265; *The Granite State*, 1 Sprague, 277; *Donnell v. The Starlight*, 106 Mass. 227, 233; *The St. Joseph*, 1 Brown Adm. 202."

See *Case v. Allen* (21 Kans. 217), 30 Am. Rep. 425.

GROW V. SELIGMAN.

(47 Mich. 607.)

Contract — to discontinue trade-name — public policy.

Jacob S. having established a ready-made clothing business under the style of "Little Jake," sold the business to the plaintiff, with the benefit of the use of that name, and stipulated not to use it in a rival business. The plaintiff conducted the business under his own name. *Held*, that the plaintiff might enjoin the defendant from a violation of that agreement.

INJUNCTION. The opinion states the case. The plaintiff had judgment below.

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Shepard, Lyon & Clark and Hatch & Cooley, for complainants.

Tarsney, Tennant & Weadock, for defendants.

COOLEY, J. The complainants in this suit constitute the firm of Grow Brothers, doing business as wholesale and retail dealers in ready-made clothing at Bay City. In their bill in this cause they state that previous to the year 1872 the defendant Jacob Seligman was a retail dealer in ready-made clothing at Bay City, carrying it on under the name and style of "Little Jake," and complainants were clerks for him; that in that year complainants purchased of him the said business, and also purchased the right to use the name and style of "Little Jake" in carrying on and advertising the said business, and in consideration that Seligman would not thereafter sell, transfer or give to any person or firm the right or permission to use the words and name "Little Jake" in conducting a business at Bay City, and would not again enter into business at Bay City of a similar kind, they paid to him the price agreed upon therefor.

Complainants further state that at the time of their said purchase Seligman represented to them that the words "Little Jake" were a trade-mark belonging exclusively to himself, and that he procured the same to be copyrighted under the laws of Congress; that after purchasing his business they immediately commenced to use the words "Little Jake" in advertising the same, and carried on the business under that name for three years or more, when they commenced to advertise under the name of Grow Brothers, though not using that name exclusively; that they have built up a large and profitable business, and in the meantime said Seligman has been carrying on a large and profitable business of a similar nature at East Saginaw; that in January, 1881, it came to the knowledge of complainants that said Seligman was making arrangements to establish a business house at Bay City for the purpose of carrying on the business of retail dealer in clothing, hats, caps and furnishing goods, and that he had associated with him for the purpose Joseph Seligman and Frank Rossman, the other defendants; that they soon circulated advertisements that "Little Jake, Rossman & Co." were about to establish themselves at Bay City to engage in carrying on the business of dealing in clothing, hats, caps, furnishing goods and lumbermen's supplies; that complainants protested to said

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Seligman and called his attention to their said agreement, but were told by him that he did not care for the agreement and should start the store in Bay City; that said Seligman with his associates has rented a store in Bay City, filled it with a stock of clothing, etc., and advertised that "Little Jake, the king clothier" will open it on a day specified, and that he is about to do so under the business name of "Little Jake, Rossman & Co." in disregard of his agreement.

And complainants pray that "the sole right to use the name 'Little Jake' in carrying on and advertising the clothing, hats, caps, and gents' furnishing goods business at Bay City, may be decreed to belong to and be the exclusive property of your orators, and that the said Jacob Seligman may be perpetually enjoined and restrained from now or hereafter carrying on the business at Bay City, Michigan, of selling clothing, hats, caps and gents' furnishing goods, either individually or as a copartner in the firm of 'Little Jake, Rossman & Co.,' or in any other firm, copartnership or corporation by whatever name it shall be called at, Bay City, Michigan, and that the said firm of 'Little Jake, Rossman & Co.,' and each and every member of said firm, may be perpetually enjoined and restrained from advertising in any manner the business of selling at Bay City, clothing, hats, caps and gents' furnishing goods by using the words and trade-mark 'Little Jake,' and from using the said words 'Little Jake,' in any manner in said business at said Bay City." The defendants filed an answer in the nature of a demurrer admitting all the facts set out in the bill, but denying that upon them complainants are entitled to any relief.

The decree made by the Court of Chancery, and from which the defendants have appealed, is "that the said defendants be perpetually enjoined from using in advertising the business of selling clothing, hats, caps and gents' furnishing goods at Bay City, Michigan, the style and words 'Little Jake, and from in any manner, either singly or in connection with other words, characters, figures or devices using the words 'Little Jake,' in carrying on said business at said Bay City, Michigan, and that said defendant, Jacob Seligman, be perpetually enjoined from engaging in or carrying on the business of selling clothing, hats, caps and gents' furnishing goods, at said Bay City, directly or indirectly, either individually or as copartner in the firm of Little Jake, Rossman & Co., or in any other firm or copartnership by whatever name the same may be called."

In the argument in this court it is conceded that the contract between complainants and Jacob Seligman, which is set up in the bill, so far as it restrained Seligman from carrying on the business at Bay City, was one which it was lawful for the parties to enter into, and a breach of which might justly and properly be enjoined. It is argued however that in so far as the contract provides for the use by complainants of the business name of "Little Jake" it provides for a deception upon the public; the apparent purpose being to mislead the public into the supposition and belief that a person with whom they had been accustomed to deal, and who had established a business reputation upon which they relied in their dealings with him, was still continuing the same business, and that the public would have in any transactions with him all the assurances of fair and just dealings which could come from such established reputation. And it is insisted that equity should not assist in enforcing a contract of which deception of the public is the purpose.

The principle upon which defendants rely is plain enough, and has often been recognized in cases having resemblance to the present in some of their features. Among these cases are *Wolfe v. Burke*, 56 N. Y. 115; *Taylor v. Gillies*, 5 Daly, 285; *Palmer v. Harris*, 60 Penn. St. 156; *Meriden Co. v. Parker*, 39 Conn. 450; s. c., 12 Am. Rep. 401; *Connell v. Reed*, 128 Mass. 477; s. c., 35 Am. Rep. 397. But as complainants show by their bill they have for some time been carrying on the business under their own name, and as the decree does not go beyond enjoining the defendants from making use of the name "Little Jake" in their own business, we are not called upon to determine whether complainants could or could not be protected in the use by themselves of the same name in their own business. There was nothing illegal in Jacob Seligman agreeing to withdrawal together from the business at Bay City, and no necessary deception upon the public in his stipulating to discontinue the use of his previous business name. It is a breach of this stipulation that the court has enjoined.

It is also urged on the part of the defendants that the decree is too broad in restraining the defendants Joseph Seligman and Frank Rossman, who were not parties to the contract with complainants, from carrying on their own business in any way or mode which would have been open to them if no such contract had been in existence. But under the facts shown by the bill and admitted by the answer it is plain that the use of the name "Little Jake" is

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the business of these two defendants at Bay City, would be calculated to lead the public to suppose that the defendant, Jacob Seligman, was associated in the business with them. If he is associated with them in fact, it is a violation of his agreement and a wrong to the complainants in which all the defendants unite; if not associated with them, the use of the name is calculated to mislead the public to the prejudice of complainants. That the purpose of making use of the name in their new business at Bay City was to deprive complainants of the advantages for which they had paid when they purchased Jacob Seligman's business, is charged by the bill and admitted by the answer; and that was a distinct wrong in which all of the defendants united. It was a wrong whereby they expected to appropriate the good-will of a business which belonged to complainants; and the decree is no broader than is essential to preclude its consummation.

The decree must be affirmed with costs. It was conceded on the argument that certain clerical errors were committed in drafting the decree, and these counsel will correct.

Judgment affirmed.

The other justices concurred.

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WILLIAMS V. POWELL.

(66 Ala. 20.)

Fraud — constructive — contract between administrator and distributee.

A contract between an administrator and one of his distributees, by which the latter sells the former all his interest in the estate, is presumptively void, but mere inadequacy of consideration will not avoid it.*

BILL to set aside a contract of sale. The opinion states the case. The plaintiff had judgment below.

E. J. Fitzpatrick, for appellant.

Gunter & Blakey, contra.

BRICKELL, C. J. The bill is filed for the rescission of an assignment, or transfer to the appellant, made by the appellee, passing

* See *Audenreid's Appeal* (89 Penn. St. 114), 33 Am. Rep. 731.

and conveying her share and interest as one of the heirs and next of kin in the estate of her deceased father, William T. Judkins. The appellant was the administrator of the estate, and the brother-in-law of the appellee.

Trustee and *cestui que trust* are not disabled from dealing with each other, in reference to the trust estate; but upon principles of public policy, all transactions between them by which the trustee acquires, and the *cestui que trust* parts with rights in and to the trust estate or is released from liability to account, are viewed with jealousy and can be sustained only in the absence of all fraud, or concealment, or neglect to disclose fully and fairly all information acquired in the course of the relation, and the true condition of the estate, and when founded upon an adequate consideration. Upon the trustee lies the burden of proof, and these facts must be shown by him satisfactorily, or the contract will be avoided at the election of the *cestui que trust*, seasonably expressed. *Johnson v. Johnson*, 5 Ala. 90; *Juzan v. Toulmin*, 9 id. 662; *Ferguson v. Lowery*, 54 id. 510; s. c., 25 Am. Rep. 718; *Malone v. Kelly*, 54 Ala. 532; *Waddell v. Lanier*, 62 id. 347.

There is no room, in this case, for the imputation of fraud to the appellant, or concealment or a neglect to disclose every fact of which the appellee ought to have been informed, to enable her to deal intelligently in the transaction. We can not doubt, upon the evidence, that she knew before the assignment was executed the condition of the estate, and the probable value of her distributive share. The matter was the subject of negotiation for some time, and she had the advice of her brother-in-law, McCarty, who had retained counsel and investigated the state of appellant's accounts and the condition of the estate, all the property of which was as well known to the one party as to the other.

The contract is assailed really, rather because of the inadequacy of the consideration, than because of fraud or concealment, or a want of knowledge of material facts upon the part of the appellee. Inadequacy of consideration is not of itself, aside from the unfavorable inference to which it may give rise, ground for avoiding the contract. *Juzan v. Toulmin*, 9 Ala. 662; *Judge v. Wilkins*, 19 id. 765. And it seems clear, from the evidence, when closely examined, that inadequacy of consideration cannot be imputed to this transaction. The probable value of the distributive share of the appellee, at the time of the assignment, was not more than two

thousand dollars. The payments made to her, with interest, then amounted to about fifteen hundred and fifty dollars. These payments were not the only consideration for the assignment. The extinguishment of the liability of the appellee as one of the purchasers of the lands of James H. Judkins, obtaining title to her part of the lands, was the more important consideration; and it seems demonstrated by the calculation found in the argument of appellant's counsel, that not only is there no inadequacy of consideration, but that in fact the appellee has received more than the value of her distributive share in any event. When a contract between trustee and *cestui que trust* is free from fraud, or circumvention or violation of trust and duty, and is founded on a fair consideration, courts are under the same obligation to enforce it as if no confidential relation existed between the parties. We are satisfied the assignment was deliberately executed by the appellee, and that it is free from all just exception.

The decree of the chancellor must be reversed, and a decree here rendered dismissing the bill, at the costs of the appellee in this court and in the court below.

Judgment reversed.

GREEN V. STATE

(66 Ala. 40.)

Criminal law — homicide — jurisdiction — dying declarations.

A statute authorizing a prosecution for murder to be had in the county where the fatal blow was struck although the victim died out of the State, is valid.

The admission of dying declarations is not a violation of the constitutional provision that the accused shall be confronted with the witnesses.

CONVICTION of murder. The opinion states the case.

W. Cooper and O'Neal & O'Neal, for appellant.

H. C. Tompkins, attorney-general, for State.

SOMERVILLE, J. The principal question involved in this case is that of sovereign jurisdiction in the matter of homicide, where the

Green v. State.

fatal shot or blow occurs in one State, and death ensues in another. The appellant Green, being under indictment, was convicted of the murder of Ephraim Thompson, and sentenced to the penitentiary for life. The evidence showed that the act of shooting, which caused the death, took place in Colbert county, Alabama, where the indictment was found and the trial occurred ; and that Thompson died, within a year and a day, in the State of Georgia.

It was formerly doubted, at common law, where a blow was inflicted in one county, and death by reason of the injury ensued in another, whether the offense could be prosecuted in either county. 1 East P. C. 361 ; 1 Hale P. C. 426. The better opinion seems to have been however that the jurisdiction attached in the venue where the blow was inflicted. *Id.* This difficulty, as noted by Mr. Starkie, was sought to be avoided by the legal device of "carrying the dead body back into the county where the blow was struck ; and the jury might there," he adds, "inquire both of the stroke and death." 1 Stark. Cr. Pl. (2d ed.) 3-4, note. It was to quiet doubts and obviate this difficulty, that the statutes of 2d and 3d Edw. VI, ch. 24, and the later one of 2 Geo. II, ch. 21, were enacted by the British Parliament. The example has been followed by some fourteen or fifteen States of the American Union, and by our own State among others. These statutes though different in phraseology are similar in substance and purpose. Their manifest design seems to be, to prevent a defeat of justice in administering the law of felonious homicide and other crimes, by rendering the jurisdiction certain.

The Alabama statute, as comprised in section 4634 of the Code (1876), reads as follows : "When the commission of an offense, commenced here, is consummated without the boundaries of this State, the offender is liable to punishment therefor ; and the jurisdiction in such case, unless otherwise provided by law, is in the county in which the offense was commenced."

The validity of this statute is assailed, as being beyond the scope of legitimate legislative power. It may be conceded that the laws of no nation can operate beyond its own territorial domain or jurisdiction, being local in their nature, and co-extensive only with the limits of the State by which they are enacted. As said by STORY, J., in the case of *The Apollon*, 9 Wheat. 362, "they must always be restricted, in construction, to places and persons upon whom the legislature have authority and jurisdiction." It is a safe principle perhaps to be asserted, that a crime committed in a foreign country

and in violation of the laws thereof, can not, by mere legislative fiction or construction, be constituted an offense in another country. This reasoning does not apply however to a case where a crime is perpetrated partly in one State or country, and partly in another ; " provided," as suggested by Mr. Bishop, " that what is done in the country which takes jurisdiction, is a substantial act of wrong, and not merely some incidental thing, innocent in itself alone." This principle must be subject, perhaps, to reasonable limitation. 1 Bish. Cr. Law, § 116.

We can find no case, where statutes of this character, when subjected to judicial interpretation, have been declared unconstitutional, especially where the question arose, in a case of homicide, on an indictment in the jurisdiction where the fatal blow was given. In *Commonwealth v. Parker*, 2 Pick. 550, the question was raised as to the repugnancy of a similar statute of Massachusetts to the Constitution. Chief Justice PARKER, discussing the power of the legislature to enact such a law, says : " Surely an act of the legislature, which removes all doubt as to the place of trial, by designating the county in which the death happened, is in no respect a violation of the spirit. or even the letter, of the Constitution."

The sovereign right of States to enact jurisdictional laws of this kind, though often questioned, has been uniformly sustained, and notably in the recent case of *Hunter v. State*, 40 N. J. 495. There the mortal blow was given within the jurisdiction of New Jersey, and the death of the victim occurred in Pennsylvania. It was held that the courts of the former State had cognizance of the crime, by force of a statute not unlike our own. So in the States of Michigan and Missouri. *Tyler v. People*, 8 Mich. 321 ; *Steerman v. State*, 10 Mo. 503.

If then we consider the fatal shooting of the deceased by the appellant as the commencement merely of the crime of murder charged in the indictment, and that the death of the injured party was the consummation of the offense in Georgia, the statute, conferring the jurisdiction on the Circuit Court of Colbert county, the alleged venue, was valid, and not obnoxious to legal objection.

We need not rest the decision of this question however on this particular construction of the statute. Our view is that the crime of murder consists in the infliction of a fatal wound, coupled with the requisite contemporaneous intent or design, which legally

renders it felonious. The subsequent death of the injured party is a result or sequence, rather than a constituent, elemental part of the crime. This principle is correct, we think at least so far as affects the question of jurisdiction.

As asserted by PATTESON, J., in *Rex v. Hargrave*, 5 C. & P. 170, "the giving of the blows which caused the death constitutes the felony."

In *Riley v. State*, 9 Humph. 646, the question was learnedly discussed by the Supreme Court of Tennessee. It was held, that the offense was committed at the place of the blow, though the death occurred elsewhere. The Tennessee statute required all criminal cases to be tried "in the county in which the offense may have been committed." GREEN, J., said: "That [the blow] alone is the act of the party. He commits this act, and the death is only a consequence. Therefore when the legislature enacts that the party shall be tried in the county where the offense may have been committed, they intended where the active agency of the perpetrator was employed."

In the case of *State v. Carter*, 3 Dutch. 499, it was held by the Supreme Court of New Jersey, that an indictment charging a felonious assault and battery in New York, and that the injured party came into the State of New Jersey, and there died from its effects, charged no crime against the latter State, but rather, it would seem, against the former.

The Supreme Court of California, in the case of *People v. Gill*, 6 Cal. 637, decided that the crime of murder is committed at the time when the fatal blow is struck. There the statute had been changed between the time of the offense and the death of the victim, and provided, that upon trials for crimes committed previous to the new enactment, the offender should be tried and punished under the laws in force at the time of the commission of the crime.

These views are in harmony with the conclusions reached by the most approved text-writers on criminal jurisprudence. 1 Bish. Cr. Law, §§ 112-116. We conclude then that the crime charged against the prisoner was, irrespective of the statute, one against the peace and dignity of the State of Alabama, and properly within the jurisdiction of the courts of this Commonwealth.

The appellant by his counsel further objects, that the dying declarations of Ephraim Thompson, as testified to by Lucius Thompson, are inadmissible. It is urged that they are mere hearsay

evidence, and their admission to the jury is repugnant to that clause in section 7 of the Declaration of Rights, which gives the accused the right, when on trial, to be "confronted by the witnesses against him." Const. (1875), Art. I, § 7. It is not insisted that the declarations are otherwise objectionable, as not coming within the usual rule. They were uttered under a clear conviction of impending death, and had reference only to circumstances immediately attending the crime, and relating to the identity of the perpetrator. 1 Greenl. Ev. 156; 1 Whart. Am. Crim. Law, §§ 670-71; *Walker v. State*, 52 Ala. 192.

This is the first time the question raised has been presented for the decision of this court. For more than a half century, dying declarations have been regarded as legal and admissible evidence, and the constitutionality of such testimony has gone unchallenged by the bar, and unquestioned by the judiciary of this State. The fallacy of the objection consists in the supposition, that the deceased person, whose dying declarations are proved, is the witness in the case. The witness, by whom the accused has a right to be confronted, is the one who testifies to the truth of such declarations. Lucius Thompson, not the deceased, is the witness in this case. No proposition is plainer than that this clause in the Declaration of Rights was not designed to proclaim any novel principle. It is but the repetition of an ancient and well-established principle of the common law. It was never construed in England, whence with our great system of common-law jurisprudence, it was derived, to exclude such evidence as was crystallized into that system, and recognized as a vital part of it, upon wise principles of policy, expediency, or necessity.

The 6th article of the amendments to the Constitution of the United States is in the same language as the clause under discussion in our Declaration of Rights, and so it is, perhaps, embodied in the various Constitutions of all the American States. We know of no case where this species of evidence has ever been held to contravene these several clauses of the various State Constitutions, or that of the Federal government. The decisions however are numerous to the contrary. *Campbell v. State*, 11 Ga. 355; *Woodsides v. State*, 2 How. (Miss.) 655; *Anthony v. State*, 1 Meigs (Tenn.) 265; *Robbins v. State*, 8 Ohio St. 131; *State v. Nash*, 7 Iowa, 347; 1 Whart. Am. Crim. Law, § 669.

In view of the importance of this case, we have seen fit to consider

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the questions raised somewhat at length, although the record fails to show that the charge asked by defendant was in writing, and it is not error for the court below to refuse charges requested unless they are in writing. Code (1876), § 3109; *Jacobson v. State*, 55 Ala. 151.

We see no error in the rulings of the Circuit Court, and the judgment is hereby affirmed.

Judgment affirmed.

SOUTH AND NORTH ALABAMA RAILROAD COMPANY v. WOOD.

(66 Ala. 167.)

Carrier — railroad company — delivery of goods at point where no station.

A railroad company receiving goods for carriage is not bound to make personal delivery nor give notice of arrival; and where the destination is a mere flag-station, without any agent, depot or warehouse, and this is known to the consignee, and is not unreasonable in view of its business, its liability of every sort terminates with the delivery of the goods in its car on the side track at the destination.

ACTION of damages for failure to deliver goods. The opinion states the case. The plaintiff had judgment below.

Thos. G. Jones and J. W. Inzer, for appellant.

C. F. Hamill, contra.

SOMERVILLE, J. This is an action brought by the appellee against the South and North Alabama Railroad Company for the failure to deliver a car-load of corn, received by the said company for transportation by it as a common carrier. There is no count in the complaint seeking to charge the company on the ground of negligence in the custody of the goods, in its capacity as a warehouseman.

As a general rule, the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them to the consignee, or his authorized agent.

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And the contract of carriage is one of insurance against every loss or damage, except such as may be occasioned by the act of God or the public enemy. Ang. on Carriers, § 282; *Fitchburg, etc., R. Co. v. Hanna*, 6 Gray, 539; *Heineman v. Grand Trunk Railway Co.*, 31 How. Pr. 430.

In the case of railroad companies, universal custom seems to have settled it, as being the more reasonable rule, that a personal delivery to the owner or consignee is not required. Their routes are in a measure permanently fixed, and can not be easily varied to suit the convenience or accommodation of the public. Their cars and locomotives run on certain lines or tracks, from which they can not deviate; and it is therefore implied that they shall deliver, either at the termination of their routes or at fixed intermediate stations. Hutch. on Carr., § 367. And although the authorities are greatly conflicting on the question of notice, there seems to be a preponderance of the decisions favoring the proposition that no obligation rests on railway carriers to give special notice of the arrival of goods to the person to whom they are consigned. This is not in accordance with the ancient rule governing common carriers generally; and its establishment seems to furnish a fresh illustration of that wonderful and plastic power of the whole system of the common law to mold itself to the rapid growth of modern commerce, and the new phases of an advancing civilization.

It is not unreasonable in such cases to assume that the consignee has been already advised by the consignor of the fact that the goods have been forwarded to him. It would, too, be practically impossible to require such notice to each consignee, where the arrivals of goods by this mode of transportation are so frequent and various, as is the case in populous emporiums of commerce and the great centers of railway traffic. Redf. on Carr., § 110; Hutch. on Carr., §§ 367-68.

These principles apply where the carrier has an agent or depot at the point of destination. The rule governing the liability of railroad companies in such cases, whether as common carriers or as warehousemen, is properly stated by this court in the case of *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 35 Ala. 209; and it is unnecessary for us here to reiterate it.

In the present case, as shown by the evidence, it was distinctly understood at the time of the shipment of the corn in controversy, that the South and North Alabama Railroad Company had no agent

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at "Jemison station," which was a mere "flag station," to which the car-load of corn was consigned. It was equally well made known that there was neither agent nor station at "Smith's Mills," where it was agreed that the corn might be delivered. The question presented for our decision is, did the safe delivery of the car containing the corn on the side-track at a station, where it was agreed to be received, terminate the liability of the railroad company as a common carrier?

The law does not require of railroad companies the absolute duty to construct or keep warehouses at every station along their route of travel or transportation. They are required only to do the best their means will enable them to do under existing circumstances, and must act in accordance with the reasonable necessities of their usual business. Redf. on Carr., § 120. We can see no reason why a railway company, acting as a common carrier, cannot stipulate by a contract express or implied, that their liability as a carrier shall terminate with a delivery at a particular point, and that they will assume no liability at all in such case as warehousemen.

If the consignee is fully advised at the time of shipment, that the company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do according to the reasonable and proper usages of his business.

The delivery of the car-load of corn on the side-track at "Smith's Mills" terminated the liability of appellant. It would be unreasonable to require the railroad company to employ a special agent to keep the corn in further custody, unless there was an agreement, express or implied, to do so. When the consignee was informed that there was no agent of the company there, he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment after such knowledge was an assent on the part of the shipper to the implied conditions. *Wells v. Wilmington, etc., R. Co.*, 6 Jones (N. C.), 47.

The case of the *Southern Express Co. v. Armstead*, 50 Ala. 350, is not in conflict with these views. That was a delivery by an express company, which is ordinarily required to be a personal delivery. Such companies may in fact be justly said "to owe their

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origin to the modification of the law in regard to the delivery of goods in favor of water carriers and railway companies." Hutch. on Carr., § 379. That decision was furthermore based on the ground that the evidence failed to show any contract, express or implied, waiving a personal delivery.

For the reasons above given, the second charge given by the Circuit Court was clearly erroneous.

The first charge requested by appellant was properly refused. It was vicious, in assuming that the liability of the railway company depended on its negligence, or that of its agents. Being a common carrier, the road, in the absence of a special contract limiting its common-law liability, was an insurer against every loss or damage except that occasioned by the act of God or the public enemy. It is obnoxious to the further objection that it fails to recognize the duty of exculpation which is always cast on common carriers, where a damage or injury is shown in the case of goods delivered to them for carriage. In such cases the general rule is that the *onus* of proof is always on the carrier to show that his liability terminated before the loss or damage in question occurred. Redf. on Carr., § 113; *Wardlaw v. South Car. Railway*, 11 Rich. 337.

The question to the witness Copeland and his answer were relevant and properly admitted. The evidence thus elicited tended to show the amount of corn delivered to appellant for transportation. The experiment of measuring out some of the same corn, with the same barrel originally used, was proper, to test the capacity of the vessel used and the consequent accuracy of the first measurement.

Reversed and remanded.

Reversed.

PERRYMAN V. McCALL.

(66 Ala. 402.)

Guaranty — whether continuing.

B., about to commence business, applied to the plaintiffs for goods on credit. The plaintiffs wrote him that they would be willing to fill "his order" if he would give them the defendant, who, they said, they understood indorsed for him. The defendant thereupon wrote them that he had read their

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letter, and asked them to "fill said bill," adding, "I indorse Mr. B., and I hope he may become one of your best customers." *Held* not a continuing guaranty.*

ACTION on a guaranty. The opinion states the case. The defendant had judgment below.

W. F. Glover, and Thos. B. Wetmore, for appellants.

Geo. W. Taylor, and Boyles, Faith & Cloud, contra.

STONE, J. The question in this case is, whether there was a continuing guaranty, or whether it extended to only one, and the first purchase. A brief history of the transaction is necessary to a proper solution of this question. Perryman & Co. were wholesale dealers in the city of Mobile. Burns, proposing to go into a retail business in the country, had a letter written to them, asking credit, and asking them to fill a bill he forwarded, amounting to some two hundred or more dollars. To this they replied, April 28, 1880, in which they used the following language: "As we have no personal knowledge of you, we, as prudent business men, would in the outset be compelled to require of [you] security of some kind by personal indorsement, or otherwise. Time is no object with us, — all we desire is to have matters properly secured; and if you can do so by giving such men as Mr. C. C. McCall, who Mr. Henson says indorsed for you, we are perfectly willing to fill your order, not confining you to 30 or 60 days, but letting it stand over until fall, if your needs require it; and we feel assured, that under such an arrangement, we can make it to your interest, and that we can give you full satisfaction in goods and prices." To this, C. C. McCall replied, of date May 6, 1880, in which he said: "I read the letter you wrote to Mr. J. R. Burns, in regard to furnishing him groceries, and noticed that my name would enable him to procure a stock, and resume business. Mr. Burns, I understand, requested you to send him a bill of goods, which you have. You will now please fill the said bill, less one barrel of South-Side whiskey, and ship by first boat to Tuscaloosa. Let me say to you, I indorse Mr. J. R. Burns, and hope that he may become one of your best customers. Mr. Burns will send you about fifty dollars by boat; and

*See *Merchants' Nat. Bk. of Whitehall v. Hall* (83 N. Y. 323), 33 Am. Rep. 424; *Orittenden v. Fiske*, ante, 146.

as times are dull, and our Circuit Court is over, it may be fall — say, first day of November — before he can send you much money ; but he will send what he can during the summer.” On the receipt of this letter, Perryman & Co. shipped the bill of goods previously ordered, amounting to about \$166. They subsequently made shipment to him, from time to time, and received remittances from him. The last order filled was December 2d, 1880, and the remittances made by Burns overpaid the first bill purchased. Demand of payment was made of Burns, and he failed to pay. He was then insolvent. This suit was then brought against McCall, on the alleged guaranty contained in his letter.

There is one remark in McCall’s letter, which unexplained indicates that Burns was expected to give further orders. “I indorse Mr. J. R. Burns, and hope that he may become one of your best customers.” But in construing this letter, we must not only examine it in all its parts, but we must consider the letter of Perryman & Co., to which it is a reply. Burns had then forwarded but one order for goods, and we are not informed that he contemplated forwarding others ; or if he did, that either Perryman & Co. or McCall knew he so intended. They propose, if the security they required can be furnished, “to fill your order,” in the singular number. This of course referred to the order they then held, for there was then no other order. In reply to this, McCall writes, after referring to the Perryman letter, “you will now please fill the said bill, less one barrel of South-Side whiskey,” etc. “Let me say to you, I indorse Mr. J. R. Burns,” etc. We think this a clear indorsement, of guaranty, of the one purchase then made. The superadded hope, that Burns would become one of their best customers, is too indefinite in terms to constitute the letter a continuing guaranty.

Speaking of a guaranty, in *Douglass v. Reynolds*, 7 Pet. 113, Justice STORY, of the United States Supreme Court, said : “It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms. * * The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt.” Many rulings have been made bearing on this question. We subjoin the pivotal words copied from several guaranties, which it was declared bound the guarantors only for a single, first pur-

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chase or transaction, and did not amount to a continuing guaranty.

“To any gentleman in the city of New York : Lewis C. Aldricks, a young man living in this place [Hartford], having a desire to enter into trade in a small way, and feeling ourselves confident of his well managing the business, we here offer ourselves in security to any gentleman who may feel disposed to give him credit, not exceeding seven hundred dollars ; to be bound and held firmly by this writing, to pay the said sum of seven hundred dollars, or any sum less, as the said Lewis C. Aldricks may see proper to contract.” Aldricks made purchases at two several times the aggregate sum being less than seven hundred dollars. *Aldricks v. Higgins*, 16 S. & R. 213. “Messrs. Anderson & Canan : Mr. Pratt having informed me that he is making some purchases from you, and not being acquainted with you, that you wish some reference ; though not personally acquainted, yet I would say from my knowledge of Mr. Pratt that you might credit him with perfect safety, and that any thing he might purchase from you, I would see paid for.” *Anderson v. Blakely*, 2 W. & S. 237. “Whatever goods you sell to Addison Burk, to be sold in our store, we will consent that he may take the money out of our concern to pay for the same ; only you must treat him as well about prices and length of credit, as you do your best customers. The said Addison shall have the liberty of taking the pay out of our concern as fast as the goods are sold.” *Baker v. Rand*, 13 Barb. 152. “There is a fair prospect that Mr. Richards could sell a few chamber suits, if he had them. If you will let him have them, we will see that you receive pay for them as sold, or soon after.” *Hayden v. Crane*, 1 Lans. 181. “If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time.” *Gard v. Stevens*, 12 Mich. 292. See, also, *TenEyck v. Vanderpoel*, 8 Johns. 120 ; *Cremer v. Higginson*, 1 Mason, 323 ; *Kay v. Groves*, 6 Bing. 276 ; *Boston & S. Glass Co. v. Moore*, 119 Mass. 435.

If the guaranty express that the goods are to be sold from time to time, or if it be clearly implied that such is the understanding and agreement, then the rule is different. *Cahuzac v. Samini*, 29 Ala. 288. There is nothing in our former rulings opposed to the principles stated above. *Walker v. Forbes*, 25 Ala. 139 ; s. c., 31 id. 9.

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We think the guaranty in the present case is not definite enough to be classed as continuing, and therefore hold it was exhausted when the first purchase was made. That being paid for, plaintiffs show no cause of action.

The judgment is affirmed.

Judgment affirmed.

HOUSTON V. BLACKMAN.

(68 Ala. 559.)

Deed — voluntary — husband to wife — evidence to show consideration.

A deed of lands from husband to wife, expressed to be in consideration of love and affection, and one dollar paid, is voluntary as to then existing creditors of the husband, and if assailed by them, parol evidence is incompetent to show a valuable consideration.

BILL to submit land to payment of a debt. The opinion states the case. The plaintiff had judgment below.

W. H. Barnes & Son, for appellant.

Jno. M. Chilton, contra.

BRICKELL, C. J. [Omitting a minor point.]

At common law, a consideration was not essentially necessary to the validity of a deed. Thus in Plowden it is said, *arguendo*, that "by the law of England there were two ways of making contracts for lands or chattels; the one by words, the other by writing; and because words were often spoken unadvisedly, and without deliberation, the law had provided, that a contract by words should not bind without consideration. But where the agreement was by deed, there was more time for deliberation; for which reason deeds were received as a lien final to the party, and were adjudged to bind him, without examining upon what cause or consideration they were made." 4 Green. Cruise, title Deed, ch. 2, § 36. This was said of a feoffment; but elsewhere it is said, a consideration became requisite, even to the validity of a feoffment, as none could be implied. In deeds of bargain and sale, the expression of any, the slightest consideration — for instance, a pepper-corn even — will

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support them, as between the parties. The only use and operation of the expression of a consideration, or the introduction of a clause reciting a consideration, is to prevent a resulting trust to the grantor, and to estop him from denying the making and effect of the deed for the uses therein declared. *Belden v. Seymour*, 8 Conn. 304 (21 Am. Dec. 661); *Meeker v. Meeker*, 16 id. 383; *Grout v. Townsend*, 2 Hill, 554; *Goodspeed v. Fuller*, 46 Me. 141; *Souverye v. Arden*, 1 Johns. Oh. 240; *Graves v. Graves*, 29 N. H. 129.

Though a deed is valid and operative as between parties and their privies, whether founded on a consideration or not, if any is expressed, it may for a want of a valuable consideration be void as to the creditors of the grantor. When assailed by creditors whose demands were in existence at the time of its execution, the burden of proving a consideration, and a consideration which will free it from the imputation of being made to hinder, delay or defraud creditors, rests upon the grantee, or those claiming under him. The recital of consideration in the deed, as to creditors, is not evidence—it is no more than the mere admission or declaration of the grantor. *McCain v. Wood*, 4 Ala. 258; *Br. Bank Decatur v. Kinsey*, 5 id. 9; *McGinty v. Reeves*, 10 id. 137; *McCaskle v. Amarino*, 12 id. 17; *Falkner v. Leith*, 15 id. 9; *Dolin v. Gardner*, id. 758; *Hubbard v. Allen*, 59 id. 283.

In *Potter v. Gracie*, 58 Ala. 308, it was said by this court: “It is the settled law of this State, that a deed impeached by creditors, for fraud, actual or constructive, cannot be supported by evidence of considerations different from those alleged in it. *Murphy v. Br. Bank Mobile*, 16 Ala. 90. It is at all times dangerous to relax the conservative principle of law, which declares, that when parties enter into a contract and reduce its stipulations to writing, the written memorial is the sole expositor of the contract, and cannot in the absence of fraud be varied by parol evidence. Mistakes may occur, requiring a court of equity to intervene and correct, so that the contract may conform to the intention the parties proposed expressing. But without fraud or mistake, as between the parties, the written contract is conclusive. When assailed by creditors, it must be taken, as to the parties to it, as it may be written. It cannot be supported by falsifying express recitals, which it must be presumed were deliberately made, and deliberately accepted.”

In *Maigley v. Hauer*, 7 Johns. 341, it was said by the court:

“It is a settled rule, that when the consideration is expressly stated in a deed, and it is not said also, ‘and for other considerations,’ you cannot enter into proof of any other ; for that would be contrary to the deed. * * The same rule prevails in equity, according to the cases of *Clarkson v. Hanway*, 2 P. Wms. 203, and of *Peacock v. Monk*, 1 Vesey, Sr., 127.”

In *Wilkinson v. Wilkinson*, 2 Dev. Eq. 377, it was said by Judge GASTON, considering this question : “Written instruments are to be regarded as the authentic and permanent memorials, which the parties pass deliberately, appointed to testify to all, and forever, what they have done. Parol evidence is in its nature less satisfactory. It may be tainted with falsehood, perverted by ignorance, prejudice, favor, or mistake, and is liable to mislead, because of the weakness of human memory. It is not to be questioned but that the general rule, which declares parol evidence inadmissible, to contradict or substantially to vary the terms of a written instrument, obtains in a court of equity equally as in a court of law. The consideration upon which a deed is made, is an important part of the contract ; and when it is distinctly declared, parol evidence is not more admissible to contradict, or substantially to vary that, than any other term upon which the parties have thus expressed their agreement.

The conveyances of lands between individuals, of most frequent use, are deeds of bargain and sale, or deeds operating as covenants to stand seized to uses. These conveyances derive their operation from the English statute of uses, a part of our common law, or from our own statute of uses, the same in substance. *Horton v. Sledge*, 29 Ala. 478 ; *Patton v. Beecher*, 62 id. 588. A valuable, as distinguished from a good consideration, is necessary to support a bargain and sale ; while a good consideration is essential to support a covenant to stand seized. When either of these considerations singly is expressed in a conveyance of lands, to receive parol evidence that the other was the real consideration would alter the character of the conveyance.

The conveyance now assailed was made by a husband to his wife. The consideration is expressed upon its face in these words : “as well for and in consideration of the love and affection which he has and bears toward the said Mattie B. Houston, as for the sum of one dollar paid to him cash in hand by the said party of the second part,

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the receipt whereof is hereby acknowledged." The proposition is, by parol to show that the real consideration was the payment or security of a debt, exceeding four thousand dollars, owing by the husband to the wife, for moneys of her statutory separate estate, which he had received and converted to his own use. The admissibility of the parol evidence is the decisive point of the case.

There can be no doubt, that a deed founded on and expressing a merely nominal consideration must be deemed voluntary as to creditors. *Ridgeway v. Underwood*, 4 Wash. C. C. 133. In *Murphy v. Br. Bank of Mobile*, 16 Ala. 90, the conveyance was of slaves, by a husband, to a trustee for the sole and separate use of the wife, and recited that it was made "for and in consideration of his anxiety to provide for his said wife a competent support in case of any future misfortune and embarrassment, and in and for the further consideration of one dollar, in hand paid." When assailed as voluntary by creditors, it was proposed to support it by parol evidence that the slaves had been originally given to the husband by the wife's father, upon condition that he would settle them to the separate use of the wife, and that the deed was made in compliance with this promise. It was said by DARGAN, J., speaking for the court: "Here the deed sets out the consideration on which it purports to have been executed, to wit, the anxiety of the grantor to provide for his wife, and one dollar in cash paid. The proof would establish, that the deed was executed in conformity to the understanding entered into by Dorsey at the time the negroes were delivered to him. This is a consideration entirely different from that mentioned in the deed, and parol proof cannot be received to establish it without violating the well-settled rules of evidence."

That case was in a court of law; but the rules of evidence are, as we have seen, the same in courts of equity, unless a reformation of the conveyance is sought because of fraud or mistake. Here there is an authority, decisive of this point, which has been unquestioned and approved for more than thirty years. We are not at all inclined to depart from it. If it was not apparent from the face of the deed, that the expression of one dollar as of the consideration was merely nominal, and introduced to give the deed the appearance of a bargain and sale — if it was necessary to resort to parol evidence to ascertain whether that consideration was adequate — we do not say the parol evidence of an adequate pecuniary consideration would not be

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admissible. But that consideration being manifestly nominal, and therefore not changing or expressing any other than the merely good consideration of love and affection, the parol evidence was inadmissible. Excluding it, the conveyance is purely voluntary, and void against the existing creditors of the grantor.

Let the decree of the chancellor be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

SMITH V. JANSEN.

(12 Neb. 125.)

Negotiable instrument — bona fide purchaser.

One who buys five promissory notes of the face value of \$100 each, secured by mortgage on real estate, for \$80, a few days before one of them is due, may properly be found not a *bona fide* purchaser.*

ACTION on promissory notes. The opinion states the case. The defendant had judgment below.

Pinero & Selby and *B. F. Perkins*, for appellant.

Davidson & Easterday and *T. Appleget & Son*, for appellees.

* But where a bank purchased notes for three-fifths of their face value, the bank may properly be found a *bona fide* purchaser in the absence of proof of their real value. *Citizens' Bank v. Ryman*, 12 Neb. 541.

MAXWELL, C. J. In January, 1876, the defendants applied to one B. F. Perkins, agent of P. D. Cheney and others, for a loan of \$200. A loan for the above amount was obtained on five years' time, the interest thereon to be twenty per cent per annum, the defendants paying Perkins \$150 out of the \$200 for his services in effecting the loan. Eleven notes, one for \$200 and ten for \$20 each appear to have been taken, but the note for \$200 and five of the interest notes appear to have been paid, at least are not directly involved in this case. Five of the interest notes, amounting to \$100, were secured by a separate mortgage, and on the 3d of January, 1877, were transferred to the plaintiff. He claims to have purchased the same for \$30, and to be a *bona fide* purchaser. The court below found that he was not a *bona fide* purchaser and dismissed the action. He appeals to this court.

The only question presented by the record is whether or not he is a *bona fide* purchaser. The rights of a holder of negotiable paper purchased before due are to be determined by the simple test of honesty and good faith on his part in making the purchase. In determining whether the purchaser has acted in good faith or not the amount of the consideration may become a material inquiry.

In *Dewitt v. Perkins*, 22 Wis. 474, it was held that purchasing a note of \$300 for \$5 against a solvent maker was very strong if not conclusive evidence of bad faith. And a like decision was rendered in *Hunt v. Sandford*, 6 Yerg. 387, where a note for \$333.33 was purchased for \$125, and in *Gould v. Stevens*, 43 Vt. 125; s. c., 5 Am. Rep. 265, where a note for \$300 was purchased for \$50. In some of the cases it is said that the consideration must be full and fair as well as valuable. *Goldsmid v. Lewis Co. Bank*, 12 Barb. 410; *Hall v. Wilson*, 16 id. 548.

In the case at bar, notes for \$100 secured by mortgage upon real estate, and presumably worth their face less the interest, were purchased for \$30, one of the notes being then due in a few days. Was this not sufficient to put the plaintiff upon inquiry as to the inception of the notes? Suppose the notes had been stolen and transferred to the plaintiff, would not the fact that he had purchased them for less than one-third of their face value have been sufficient to put him upon inquiry as to the title he acquired? Courts have gone quite far enough when they protect purchasers in good faith.

In *Miller v. Race*, 1 Burr, 452, the action being for a bank bill

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that was stolen, Lord MANSFIELD said: "Here an innkeeper took it *bona fide* in his business, from a person who made the appearance of a gentleman. Here is no pretense or suspicion of collusion with the robber, for this matter was strictly inquired into at the trial, and it is so stated in the case." "Indeed, if there had been any collusion, or any circumstance of unfair dealing the case had been otherwise. If it had been a note for £1,000 it might have been suspicious; but this was a small note for £21 10s. only, and money given in exchange for it." The same principles were afterward applied by the same judge to negotiable paper, and *Miller v. Race* may be regarded as the leading authority upon this branch of the law.

Again the holder must have taken the paper in the usual course of trade in order to be protected, which does not appear to have been the case with the plaintiff.

We have carefully read the entire testimony, and in our opinion it clearly sustains the finding of the court below. The judgment is therefore affirmed.

Judgment affirmed.

WILCOX V. DRAPER.

(12 Neb. 123.)

Guaranty — notice of acceptance.

An absolute agreement of guaranty requires no notice of acceptance.

SUFFICIENTLY reported, 39 Am. Rep. 222.

RAYMOND V. GREEN.

(12 Neb. 215.)

Set-off — damages — attorney's fees on attachment.

In an action on an undertaking against principal and surety, the principal may set off a demand due him from the plaintiff.

An unpaid reasonable demand of attorneys for procuring the dissolution of an attachment is a proper item of damages in an action upon the undertaking.*

* To same effect, *Bulling v. Tate* (65 Ala. 417), 39 Am. Rep. 5, and note, 13.

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ACTION on an undertaking. The opinion states the case. The plaintiff had judgment below.

Harwood & Ames, for plaintiffs in error.

France & Sedgwick, for defendants in error.

MAXWELL, C. J. This action was brought by Green & Co., in the District Court of York county, upon an undertaking in attachment, of which the following is a copy :

“ Know all men by these presents, that we, Raymond Brothers, as principal, and Cyrus Langworthy, as surety, are held and firmly bound unto Green & Company, in the sum of five hundred and fifty dollars (\$550), upon conditions following : Whereas the said Raymond Brothers is about suing out of the office of the County Court judge, in and for said county, a writ of attachment against the property of said Green & Company, defendants, for the sum of two hundred and sixty-five dollars and thirty-two cents (\$265.32), in a certain action against the said Green ; now if the said Raymond Brothers shall pay all damages which the said Green & Company may sustain, by reason of the unlawful suing out of said writ, then this obligation to be void, otherwise to remain in force.

“ Witness our hands, this 2d day of March, A. D. 1878.

“ RAYMOND BROTHERS, *Principal*.

“ CYRUS LANGWORTHY, *Surety*.”

Raymond Brothers, in their answer to the petition, *first*, deny certain facts stated therein ; *second*, set up as a set-off certain drafts drawn by them on Green & Co. and accepted, upon which there is due the sum of \$265.52 and interest. Green & Company demurred to the set-off and the demurrer was sustained.

This case seems to have grown out of that of *Green v. Raymond*, 9 Neb. 295.

The first question to be determined is, was the set-off of Raymond Brothers a proper matter of set-off.

In the case of *Boyer v. Clark*, 3 Neb. 161, this court held that a claim for unliquidated damages, the recovery of which is still uncertain, cannot be the subject of set-off.

Section 100 of the Code of Civil Procedure provides that : “The defendant may set forth in his answer as many grounds of defense,

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counter-claim and set-off as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action, which they are intended to answer."

Section 101 provides that "The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction, set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action."

Section 104 provides that "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court."

The term set-off is here preserved, and is distinguished from counter-claim.

The defense of set-off was unknown to the common law, it being purely the creature of statute, at least in courts having no equity jurisdiction. § 13, ch. 22, of 2 Geo. 2, made perpetual by 8 Geo. 2, ch. 24, § 4, provides that : "Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued, as executor or administrator, when there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case may require, so as at the time of his pleading the general issue, when any such debt of the plaintiff, his testator or intestate, is intended to be inserted or given in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

The object of these statutes was to prevent cross actions between the same parties. *Isberg v. Bowden*, 8 Exch. 852, 22 Eng. L. & E. 551 ; *Wallis v. Bastard*, 4 De. G. M. & G. 251 ; 31 Eng. L. & E. 175. The law of set-off, at the present time, may be said to consist of the rules and principles derived from adjudications upon the above statutes. A set-off is allowable in all cases of mutual debt—that is, in all claims in the nature of a debt.

In *Green v. Farmer*, 4 Burr. 2220-1, Lord MANSFIELD said : "Natural equity says, that cross-demands should compensate each other, by deducting the less sum from the greater, and that the difference is the only sum which can be justly due. But positive

law, for the sake of the forms of proceeding and convenience of trial, has said, that each must sue and recover separately, in separate actions. It may give light to this case, and the authorities cited, if I trace the law relative to the doing complete justice in the same suit, or turning the defendant around to another suit, which under various circumstances may be of no avail. Where the nature of the employment, transaction, or dealings necessarily constitutes an account, consisting of receipts and payments, debts and credits, it is certain that only the balance can be the debt ; and by the proper forms of proceeding in courts of law or equity the balance only can be recovered. After a judgment, or decree "to account," both parties are equally actors. Where there were mutual debts unconnected, the laws said they should not set off ; but each must sue. And courts of equity followed the same rule, because it was the law ; for had they done otherwise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this in the case of bankrupts ; and it was provided for by 4 Anne, ch. 17, § 11, and 5 Geo. 11, ch. 30, § 28. This clause must have everywhere the same construction and effect ; whether the question arises upon a summary petition, or a formal bill, or an action at law. There can be but one right construction ; and therefore if courts differ one must be wrong. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring, that Parliament interposed by 2 Geo. 11, ch. 22, and 8 Geo. 11, ch. 24, § 5."

It is the policy of our law to settle in one action, so far as may be, all claims arising upon contract between the same parties. And this too, whether the damages are liquidated or not. In the case at bar the action is brought upon the undertaking — the contract of the plaintiff to pay whatever damages the defendant should sustain by the attachment, if it was wrongfully issued. In no event can the judgment on the undertaking exceed the penalty therein, while it may be very much less. In our opinion it is more in harmony with the letter and spirit of the Code to allow a set-off to be pleaded in all actions founded upon contract. And that too, whether the damages are liquidated or not. *Stevens v. Able*, 15 Kans. 584 ; *Read v. Jaffries*, 16 id. 534. The doctrine of *Boyer v. Clark*, is therefore modified to that extent. And the Raymond Brothers

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being the principals in the undertaking, and the claim being in their favor, may be set off. *Wagner v. Stocking*, 22 Ohio St. 297.

The value of the services of the attorneys employed by Green & Co., to procure a dissolution of the attachment, was a proper item of damages, and the fact that such services had not been paid for would not prevent a recovery of the amount reasonably due. The judgment of the District Court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

GARTRELL V. STAFFORD.

(12 Neb. 545.)

Statute of frauds — sale of lands — signing memorandum.

Under the statute of frauds a memorandum of a contract for the sale of lands need be signed only by the vendor.*

ACTION for specific performance. The opinion states the case. The plaintiff had judgment below.

Colby & Hazlett, for appellant.

Pemberton & Forbes, for appellee.

MAXWELL, J. This is an action to enforce the specific performance of an alleged contract for the conveyance of real estate. The land in controversy is situated in Gage county, and the plaintiff is a resident of that county, while the defendant is a resident of California. The contract was made by certain real estate agents on behalf of the defendant, upon the authority of certain letters signed "Mrs. Julia A. Stafford." A decree was rendered in the court below in favor of the plaintiff. The defendant appeals to this court. It appears from the evidence that during the summer of 1879 a letter, of which the following is a copy, was delivered to Messrs. Somers & Schell, real estate agents, Beatrice.

* See *Steel v. Fife* (48 Iowa, 99), 30 Am. Rep. 383.

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MONTICELLO, NAPA Co., CAL., *June 11, 1879.**Real Estate Agent, Beatrice, Neb.:*

DEAR SIR — Not being acquainted with the name of a real estate agent in your place, you will excuse the omission. I have a farm in Gage county, Neb., which I am very desirous to sell, and want to put it into the hands of some agent who will attend to it promptly. I will sell it very cheap as I am in California sick, and need the money. It is known as the "Stafford farm" and has belonged to me and my husband, now deceased, over twenty years, you can see the deed recorded in the Beatrice clerk's office. It is situated on the Little Nemaha river. It is a fine farm, well watered and well timbered, with plenty of rich bottom land. Several years ago, O. E. Moore, residing in the same neighborhood, offered me two thousand dollars for it, but I did not then wish to sell. I have lately offered it for eighteen hundred dollars, but if you take it in hand I would like for you to do the best that you can. G. Hillman, of Hooker, eight miles distant from my place, has charge of it, and has rented it to Peter Stockhouse. I would like to hear from you immediately, and if you will attend to this promptly it is all that I can desire.

Yours very respectfully,

Address Mrs. JULIA A. STAFFORD,
Monticello, Napa Co., Cal.

To this the following letter was sent directed to "Mrs. Julia Stafford, Monticello, Napa county, California:"

Yours of the 11th inst. has fallen into our hands. We will take charge of your land and sell it to the best advantage as soon as possible. Please give us the terms upon which you are willing to sell. It is very hard to get all cash down for land. If you will take one-third down, and balance in one and two years at ten per cent on deferred payments, we could sell quicker no doubt. But give us your terms and we will go to work and sell as quick as possible. Yours,

SOMERS & SCHELL

To this they received the following reply:

MONTICELLO, NAPA Co., CAL., *June 24th.*

Messrs. SOMERS & SCHELL, Beatrice, Nebraska:

Yours of June 18th came promptly to hand to-day, and I hasten to reply. The place at \$1,800 cash, would be very cheap. I would

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much prefer to sell at that figure for cash, than to get more and wait; but if you cannot sell at that figure for cash, I will take \$2,500, one-third down and the balance in one and two years at ten per cent interest on remainder, with mortgage for security on the place. If possible I would like to have it sold before the first of next September. The place is an uncommonly good one, and I am very anxious to sell. Please do the best you can, and thanking you for promptness in the matter, I am yours very respectfully,

Mrs. JULIA STAFFORD,
Monticello, Napa Co., Cal.

In reply Somers & Schell sent the following:

Sept. 6—9.

Mrs. JULIA STAFFORD, Monticello, California:

DEAR MADAM — We have an offer from M. H. Gartrell, of \$1,500, for your n. w. one-fourth 1 — 6 — 8, in this county. Will pay \$500 cash, balance in five annual payments of \$200 each, with eight per cent interest. We tried to get better offer out of him, and told him what your price was. We however write you in regard to the matter. Write us by return mail. Yours truly,

SOMERS & SCHELL

The letter received in answer to the above is as follows:

MONTICELLO, NAPA CO., CAL., *Sept. 12, 1879.*

Messrs. SOMERS & SCHELL, Beatrice, Nebraska:

SIRS — Yours of Sept. 6th, is just received. I think the price too low, but as I am in very needy circumstances and must have money, I have after much deliberation concluded to take it. I am anxious for you to sell it and close the affair as soon as possible, because I need the money at present very much. Yours truly,

Mrs. JULIA STAFFORD,
Monticello, Napa Co., California.

On receipt of the letter of September 12 Somers & Schell addressed a letter to the defendant at Monticello, California, containing a deed for her to execute to Mr. Gartrell, etc. To this letter they received the following:

MONTICELLO, NAPA CO., *Sept. 30.*

Messrs. SOMERS & SCHELL:

Yours of the 16th of September with the deed was received by me a few days ago. Owing to the fact that there is no notary pub-

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lic or proper officer to sign the deed before, near here, I have been unable to return it and will not be able to send it back for about a week from this day. I therefore thought proper to drop you a line to let you know the cause of the delay. I may just mention here in this connection that before sending the mortgage and also the notes, I wish you to have them recorded. Send the notes and mortgage to my address at Germantown, Colusa Co., Cal., in registered letters in care of T. C. Hillman.

Very respectfully,

Mrs. JULIA STAFFORD,

Germantown, Colusa Co., Cal.

On the 3d of October of that year, a letter dated at Monticello, California, signed "Mrs. Julia A. Stafford," was sent to Messrs. Somers & Schell, saying that the deed for the land in question would be sent on the 7th inst. It is unnecessary to refer to the other letters set out in the record.

No deed for the land in controversy has been received, and this action was brought by the purchaser to enforce the contract.

[Omitting minor points.]

The fourth objection is that there is no contract in writing. Our statute provides that "every contract for the leasing, for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." Comp. St. 287. By the fourth section of the statute of frauds and Perjuries (29 Char. 2), it was enacted that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer in damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The law is now

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well settled that under this statute the agreement need only be signed by him who is to be charged by it. *Seton v. Slade*, 7 Ves. 265; *Fowle v. Freeman*, 9 id. 351; *Martin v. Mitchell*, 2 Jac. & W. 426; *Laythoarp v. Bryant*, 2 Bing. N. O., 735; *Ballard v. Walker*, 3 Johns. Cas. 60; *Clason v. Bailey*, 14 Johns. 484; *McCrea v. Purmort*, 16 Wend. 460 (30 Am. Dec. 103); *Penniman v. Hartshorn*, 13 Mass. 87; *Thayer v. Luce*, 22 Ohio St. 62; *Justice v. Lang*, 42 N. Y. 493; s. o., 1 Am. Rep. 576; *Lowber v. Connit*, 36 Wis. 176.

Chancellor KENT, in *Clason v. Bailey*, said that the weight of the argument was in favor of the construction that the agreement concerning lands should be mutually binding, and the same views were expressed by Verplank, senator, in the court of errors in *Davis v. Shields*, 26 Wend. 362, but both agreed that the law was well settled the other way both in this country and England. A change to conform to the views of Chancellor KENT was afterward recommended by the revisers of the New York statutes, but the legislature rejected the alteration and adhered to the old words. See Willard's Eq. 267-8. The same objection was made in the case of *Laythoarp v. Bryant*, where it was said that unless the agreement was signed by both parties there would be a want of mutuality, but the chief justice said, "Whose fault is that? The defendant might have required the plaintiff's signature, but the object of the statute was to secure the defendant's. The preamble runs 'for prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury,' and the whole object of the legislature is answered when we put this construction upon the statute. Here, when the party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and the mutuality of claims, * * * I find no case nor any reason in saying that the signature of both parties is that which makes the agreement."

It is sufficient if the contract or memorandum thereof is signed by the party to be charged, that is, by the vendor; but in this case the testimony tends to show that Somers and Schell were the agents of both parties, or middlemen, and that as such agents they made the proposition of the plaintiff so that he would be bound by their acts in that regard. And independently of such agency, bringing

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this action is an affirmance of his liability. If the signature of Mrs. Stafford is genuine we therefore hold that the contract is sufficient to entitle the plaintiff to recover.

[But on another point]

The cause is remanded for further proceedings.

Remanded.

DUNBIER V. DAY.

(13 Neb. 506.)

Innkeeper — Liability for money stolen from guest

An innkeeper is liable for money stolen from his guest, the guest himself not having been negligent, and there being no evidence to show how or by whom it was stolen. (*See note, p. 777.*)

ACTION against innkeeper for money stolen from guest. The opinion shows the facts. The defendant had judgment below.

M. H. Sessions, for plaintiff in error.

Robert Steele and *Whitmoyer, Gerrard & Post*, for defendant in error.

LAKE, J. [Omitting a discussion of evidence.] The only remaining grounds of alleged error to be examined relate to certain of the instructions given to the jury, and to others that were requested, but refused. The second instruction was excepted to. It was in these words :

“A guest cannot recover against an innkeeper for the loss of his goods when his own negligence has contributed to such loss. Slight omissions of care on the part of the plaintiff will not prevent his recovery. And in determining whether the plaintiff, Dunbier, by his own negligent acts has contributed to the loss, you should carefully consider all the facts and circumstances of the case, his age, amount of money, the manner in which he says he carried it, in the opening of such money in the depot in Council Bluffs, the fact (it it be a fact) that it was opened and counted in the dining

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room of defendant's hotel, the chances for being observed by designing parties from within or through the windows of such dining room, the fact that the plaintiff retired, leaving his door unlocked, if there was a bolt or lock on the door of his sleeping room; these, together with all other facts and circumstances, should be considered by you."

The concluding clause of this instruction certainly gave to the jury an exceedingly wide range to search for proof of negligence on the part of the plaintiff. "All other facts and circumstances" is rather too indefinite as a guide to a jury upon a question of this sort. Besides, of this entire recital of facts which the jury were specially directed to, the only one from which the least degree of negligence could be imputed to the plaintiff, was the leaving of his bed room door unlocked. And even this neglect the jury was properly told in this immediate connection "would not necessarily constitute such negligence" as would prevent a recovery. And certainly neither the plaintiff's age, the amount of the money, nor the manner in which he carried it, was evidence of contributory negligence to the loss at the defendant's inn. Neither was the opening of his portmonnaie at Council Bluffs, on the day preceding the loss, when he had occasion to take out some money for the payment of his fare from Omaha to the end of his journey. And the same is true of the fact of his counting his money in the dining room of the defendant's house. There is nothing in either, or all of these facts combined, that would relieve the defendant in any degree from the obligation which the law put upon him as an innkeeper to observe the utmost care for the security of the plaintiff's property, or money which he had with him while at his house. This instruction must have caused the jury to consider as evidence of negligence on the part of the plaintiff matters that were not so. It was therefore prejudicial to him, and good cause for a reversal of the judgment.

The third instruction was, we think, also erroneous in this: After informing the jury that as to the fact of the money in question having been taken into the hotel, the burden of proof was on the plaintiff, and that it must be established by a preponderance of evidence, it proceeds thus: "If he has failed to produce such preponderance, or if the evidence is evenly balanced, you should find for the defendant without considering the other questions in the case."

As we have already shown, the evidence that the money was

taken into the house was conclusive, with really nothing opposed to it. Three credible witnesses, whose testimony on this point stands practically undisputed, swore positively and particularly to the fact. It was a matter about which they could not have been mistaken. Under these circumstances to suggest to the jury that there was serious doubt on the subject, or that they might find the evidence "evenly balanced," was error.

The fourth instruction was excepted to. It was as follows :

"If you find that the defendant, as proprietor or keeper of said hotel, was not guilty of any neglect or want of care in providing for the comfort of his guests, and the safety and security of their property, but on the contrary he had taken all the care, pains, and precaution which a careful, prudent, and conscientious man could have taken under like circumstances for the safe-keeping of the property of his guests ; and if the plaintiff's money was lost in defendant's hotel without any negligence or fraud on the part of the said defendant, or any of his family, or any of his servants, the law will not hold him liable for said loss."

This instruction is obviously objectionable. It is wanting in precision as to the degree of care and responsibility which the law imposes upon an innkeeper for the safety of his guest's property. Just what exemption from that extreme care, which according to the great weight of authority, the law does exact, was intended by the phrase "under like circumstances," or how the jury understood it, we have no means of knowing. Certain it is however that there is nothing in the record which could properly be held to relieve the defendant from the utmost care which the law would impose upon an innkeeper in any case.

"Innkeepers," says Kent, in his Commentaries, Vol. 2, *593, "are held responsible to as strict and severe an extent as common carriers. * * The responsibility of an innkeeper for the horse or goods of his guest whom he receives and accommodates for hire, has been a point of much discussion in the books. In general he is responsible at common law for the acts of his domestics, and for thefts, and is bound to take all due care of the goods and baggage of his guests deposited in his house, or intrusted to the care of his family or servants, without subtraction or loss, day and night."

And Mr. Redfield, in his work on Carriers and other Bailees, 458 *et seq.*, in speaking upon this subject, says : "We should now state the rule of law in regard to the extent of the innkeeper's

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responsibility to be, that he is presumptively responsible for all injuries happening to the goods of his guests, and by them intrusted to his care ; and that he cannot exonerate himself except by showing that he did all to insure their safety, which it was in his power to do, and that no default is attributable to his servants or guests." And on page 464 : " It seems to be the fair result of all the cases that the innkeeper is responsible for all the property of every kind which the traveller finds it convenient to have about him as a traveller."

In *Houser v. Tully*, 62 Penn. St. 92 ; s. c., 1 Am. Rep. 390, this language is used : " He," the innkeeper " is bound to take all possible care of the goods, money, and baggage of his guests, deposited in his house, or intrusted to the care of his family or servants ; and he is responsible for their acts, as well as for the acts of other guests. If the goods of the guests are damaged in the inn, or are stolen from it by the servants, or domestics, or by a stranger guest, he is bound to make restitution ; for it is his duty to provide honest servants, and to exercise an exact vigilance over all persons coming into his house, as guests or otherwise. His responsibility extends to all his servants and domestics, and to all the moneys of his guests which are placed within the inn ; and he is bound in every event to pay for them if stolen, unless they were stolen by a servant or companion of the guest." 1 Am. Rep. 390. And by the better authorities such seems to be the extent of the rule where the goods are stolen from the inn, and as in this case, there is no evidence to show how it was done, or by whom ; the only exceptions being those losses arising from the negligence of the guest himself, the act of a companion guest, or superior, or as many of the cases put it, " irresistible force." Redf. on Carr., § 596. See also *Pinkerton v. Woodward*, 33 Cal. 557 ; *Sibley v. Aldrich*, 33 N. H. 558 ; *Shaw v. Berry*, 31 Me. 478 ; *McDaniels v. Robinson*, 26 Vt. 316 ; *Piper v. Manny*, 21 Wend. 282 ; *Hawth v. Franklin*, 20 Tex. 798 ; *Johnson v. Richardson*, 17 Ill. 302 ; *Mason v. Thompson*, 9 Pick. 280 (20 Am. Dec. 471). And when the fact of the loss having occurred within the inn is established, which devolves upon the guest, the burden of showing it to be within one of these exceptions rests upon the innkeeper. *Norcross v. Norcross*, 53 Me. 163. The last clause of this instruction is also open to the objection that it may be taken as relieving the defendant from responsibility for the acts of his other stranger guests.

Another of the instructions complained of was clearly wrong for the reason that there was not a particle of evidence to which it could apply. As an abstract proposition of law however it was correct. This instruction was the sixth, by which the jury were told that if they found the money to have been stolen "by plaintiff's own friend and travelling companion," then they should find for the defendant. There being nothing before the jury to warrant a finding that the money was stolen "by the plaintiff's own friend and travelling companion," the direct and only effect of this instruction was to mislead them to his prejudice. *Meredith v. Kennard*, 1 Neb. 312; *Meyer v. Midland Pac. R. R. Co.*, 2 id. 319; *Curry v. State*, 4 id. 545; *High v. Merchants' Bank*, 6 id. 155; *Williams v. State*, id. 334; *Walrath v. State*, 8 id. 80; *Cropsey v. Arerill*, id. 151; *Uhl v. Robison*, id. 272; *Newton Wagon Co. v. Diers*, 10 id. 284; *Crete v. Childs*, 11 id. 252; *Sheldon v. Williams*, id. 272.

On behalf of the plaintiff the court was requested to give several instructions which were rejected. In this it is claimed there was error. What we have already said as to the duties and responsibilities of innkeepers, renders it unnecessary for us here to notice any of these requests save the first. By this one the court was requested to say to the jury that: "It is admitted by the pleadings in this case that the defendant is an innkeeper, and that the plaintiff was a guest at his inn on the night in question. It is not claimed by the defendant that he had in his inn an iron safe, as is provided by statute that he may, and thereby relieve himself from the common-law liability of an innkeeper. That being the case, his liability is to be governed and controlled by that law."

Where material facts alleged in a petition stand admitted by the answer, it is a right of the plaintiff to have the jury so told, and further that such facts must be taken as being true. That the relation of innkeeper and guest existed at the time in question between the plaintiff and defendant was by the pleadings an established fact which the judge had not charged. As to the rule of defendant's liability, that was correctly stated to be as fixed by the common law, he not having relieved himself from its full operation as he might have done in a measure by furnishing his inn with an iron safe, as the statute provides. We think this request should have been complied with.

For these reasons the judgment must be reversed, and a new trial awarded.

Reversed and remanded.

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NOTE BY THE REPORTER.—In *Herbert v. Marshall*, Q. B. Div., Dec. 19, 1881, the action was against an innkeeper for loss of jewelry from rooms of the plaintiffs, husband and wife, his guests, by robbery at night. The defense was that the plaintiffs were negligent, first in not bolting the door and in leaving the key on the outside; second, because the wife wore the same evening conspicuously at dinner in the hotel some of the jewelry which was stolen; and last, because the articles themselves, instead of being deposited in some safe place, were left lying carelessly about the room. The jury found for the defendant. This was affirmed. The court said: "Assuming then that the door was not bolted in fact, was that *per se* evidence of negligence by the plaintiff? The cases which had been cited, *Oppenheim v. White Lion Hotel Company* L. R., 6 C. P. 515, and *Spice v. Bacon*, 36 L. T. (N. S.) 896, showed that such an omission on the part of a guest was not by itself negligence, but that it was an element to be considered with other facts which might be proved and which taken together might amount to negligence. Here there were other facts, of the slenderest nature, no doubt, but still not such as should be excluded from the opinion of a jury—for instance, leaving the key in the lock outside, which was a temptation to thieves, and the wearing by the wife of her jewelry in a public room a few hours before. For these reasons he thought the rule should be discharged. Probably, if he had been on the jury, he should have found the other way, but what the court had to decide now was not whether the verdict was against the weight of evidence, but whether there was any evidence in law to support it. He could not say there was not, and the rule therefore must be discharged." In the *Oppenheim* case the verdict was, as it ought to have been, for the defendant. In that case the thing stolen was a bag of money, which the guest had taken from his pocket in the public room to get a coin. WILLES, J., said: "The giving a guest a key, or giving him a warning to lock his door, would certainly be a circumstance which might be urged in the innkeeper's favor. By omitting to lock his door a jury might well think that the guest chose to take the risk of robbery on himself, and that he ought to have taken more care." In *Spice v. Bacon* it was held that leaving the door unlocked was evidence of contributory negligence for the jury. The judgment went for the defendant. It seems that there ought not to be any doubt, as matter of fact, that leaving the door unlocked is negligent, and that the guest's taking out his purse or the wife's wearing her jewels is not negligent. In *Bowler v. Owens*, 60 Ga. 185, it was held error for the judge to charge that it was the duty of the guest to lock or bolt his door and window, this question being for the jury. But in *Classen v. Leopold*, 2 Sweeney, 705, it was held that the omission to lock the room does not relieve the innkeeper from liability for robbery, and the court directed a judgment for the defendant. This was founded on the leading case of *Cayle*, 8 Co. 82, where it was held that "it is no excuse for the innkeeper to say that he delivered the key of the chamber in which the guest is lodged to him, and that the guest left the chamber door open. The court said: "*Cayle's* case has not thus far been overruled or questioned in this State. Nor do I perceive any reason why it should be. The doctrine of the case was that the sole object of the giving to and acceptance by the guest of the key of his chamber (there being no attendant circumstances to show a different one), was to enable him to secure privacy at his pleasure; that the entrance of thieves or suspicious characters into the inn without the knowledge or consent of the innkeeper was to be provided against by the outer door, which was under the care and control of the innkeeper, and which it was his duty so to keep as to prevent such entrance; while as to those guests who obtained entrance with the knowledge and consent of the innkeeper, as well as to the servants, it was his duty to see that they were not thieves or suspicious characters, and if he entertained doubts as to their character, to take proper precautionary measures to preserve his other guests from loss; and that guests had a right to rely on the faithful performance of these duties by the innkeeper, and to believe that they might repose in security in their chambers, with unlocked doors, and that no necessity existed for locking the doors except for the purpose of securing privacy when they might desire it. There is no reason to be derived from the present state of society, civilization, and commerce why the doctrine should not still hold good. The only reason why a guest should be held guilty of negligence in not locking his door is that it is easier to rob a room the door whereof is unlocked, than one the door of which is locked. This reason existed at the time of *Cayle's* case, and it is no more apparent to courts and guests at this present day

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than it was then." This was a peculiarly hard case, for the guest had at first locked his door at night, but finding it made him cold to get up in the morning to let in the porter to build his fire, he adopted the practice of leaving the door unlocked all night, and did not communicate this fact to the landlord. *Cayle's* case was cited in the *Oppenheim* and *Spies* cases, but in both the fact was left to the jury; so that the *Classen* case seems in the minority. Why this is a question of fact is well stated by Lord ELLENBOROUGH, in *Burgess v. Clements*, 4 M. & S. 811: "I agree that if an innkeeper gives the key of his chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. But if there be evidence that the guest accepted the key, and took on himself the care of his goods, surely it is for the jury to determine whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room."

In *Cashill v. Wright*, 6 Ell. & Bl. 891, the guest had shown some money in the public room, and had put his watch on a table in his room, leaving the door ajar, and the watch and his money were stolen. It did not even appear that there was any lock on his door. The court below directed the jury to find for the plaintiff unless they were of the opinion that he had been grossly negligent, but he did not define gross negligence. Held, error, ERLE, J., observing: "We think that the rule of law resulting from all the authorities is, that in a case like the present the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances." "We can not say that there was not some evidence on which the opinion of the jury ought to have been taken."

In *Armistead v. Wilde*, 17 Q. B. 261, the guest ostentatiously showed money in the presence of several persons in the public room, and then openly put it into an ill-secured box which he left in that room, whence it was stolen. The court charged that gross negligence on the part of the guest would excuse the landlord, and left it to them to say whether this conduct was gross negligence. The defendant had a verdict, and this was supported. Lord CAMPBELL said: "It may in one case be gross negligence to leave property in the public room; in another it may be gross negligence to remove it thence to the guest's room." PATTERSON, J., said: "Whether such negligence exists is always a question of fact."

WILLES, J., in the *Oppenheim* case says, of *Cayle's* case, that Coke "evidently means that the fact that the guest having the means of securing his door and neglecting to avail himself of them affords the innkeeper no excuse by way of plea, as matter of law." And MONTAGUE SMITH, J., said: "The law of *Cayle's* case may remain untouched. But the fact of the guest having the means of securing himself, and choosing not to use them, is one which with the other circumstances of the case should be left to the jury. The weight of it must of course depend upon the state of society at the time and place. What would be prudent in a small hotel, in a small town, might be the extreme of imprudence in a large city like Bristol, where probably three hundred bedrooms are occupied by people of all sorts." "I think the direction was right, and that the jury came to a right conclusion."

It is true that KELLY, C. B., *Mitchell v. Woods*, 16 L. T. (N. S.) 676, at *nisi prius* directed a verdict for the plaintiff, holding that there was no duty on the guest to lock his door, and consequently it was not negligence on his part to omit to do so; but this must be considered overruled in *Spies v. Bacon*, *supra*, where the Court of Appeal reversed a precisely similar ruling of the same judge.

Harris v. Roberts.

HARRIS V. ROBERTS.

(13 Neb. 631.)

Contract—of two, to donate lands to railway—statute of frauds—public policy.

Two several owners of lots in a town, being desirous that a railway station should be located near them, agreed orally that if it should be located on the land of either, and the railway company should demand a gratuitous conveyance, the other would convey to the former half as many lots as he should have conveyed to the railway company. One owner having conveyed lots accordingly, *held*, that he might maintain an action against the other for the value of one-half thereof, the contract being void neither as against public policy * nor under the statute of frauds.

ACTION to recover the value of land conveyed to a third. The opinion states the case. The defendant had judgment below.

McKillip & Page, and O. P. Mason, for plaintiff in error.

Norval Brothers, for defendant in error.

MAXWELL, J. This is an action to recover from the defendant the value of eighteen lots conveyed by the plaintiff to the Lincoln and Northwestern Railway for depot grounds in Seward. A demurrer to the petition was sustained in the court below and the action dismissed. The following is a copy of the petition:

[Omitting this.]

The contract set out in the petition amounts to this: The plaintiff and defendant being the owners of a large number of lots in severalty in West Seward, which would be materially enhanced in value by the location of a depot near them, agreed to convey the necessary lots for that purpose gratuitously if so required. In pursuance of that agreement the plaintiff conveyed to the railroad company thirty-six lots, thus materially enhancing the value of the defendant's lots, but he now insists that the contract was void, and refuses to perform the same. He by his demurrer admits making the contract, and that he retains the special value added to his lots from the location of the depot and the transfer of the plaintiff's

* See *Williamson v. Chicago, etc., R. Co.* (53 Iowa, 126), 35 Am. Rep. 206, and note, 214.

property to secure the same, but pleads the statute of frauds as a protection. This defense would be available in an action for specific performance of the contract, but not for the price of property conveyed to a third person at the request of a promisor. Suppose the contract had been to convey to the defendant, could he after receiving a conveyance defeat the recovery of the consideration by pleading the statute? Where a verbal contract is made for the conveyance of land and the land is conveyed accordingly, the statute is no defense to recover an action to recover the price. *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 id. 549; *Linscott v. McIntire*, 15 Me. 201; *Thayer v. Viles*, 23 Vt. 494; *Morgan v. Bitzenberger*, 3 Gill, 350; *Thomas v. Dickinson*, 14 Barb. 90; *Gillespie v. Battle*, 15 Ala. 276; 3 Pars. on Cont. 35. And it seems to make no difference whether the land is conveyed to the person making the promise, or at his request to some one else.

But it is said that the contract is against public policy and void because it tends to make the officers of the railroad company disregard the rights of the public and of the company. Whatever the facts may be, there is nothing stated in the petition from which it may be inferred that the rights of either the public or the railroad company have been disregarded. For aught that appears the depot is so situated as best to accommodate the public, and the mere fact that the lots were donated is not sufficient of itself to taint the transaction as being against public policy.

In the case of *St. J. & D. C. R. R. Co. v. Ryan*, 11 Kans. 602; s. c., 15 Am. Rep. 357, the company had received a conveyance "upon the express conditions following: Said railroad shall immediately on the completion of their railroad through said lands establish a depot for freight and passengers on said lands and shall keep and maintain the same for all time; and shall not at any time have or use any other depot within three miles of said depot." The court say (page 608). "Is a contract not to build or use a depot within certain limits a valid and binding contract? Railroad companies are private corporations; yet they are declared to be *quasi* public agencies, and their roads to subserve to a certain extent public purposes, so much so that the public may be taxed to aid in their construction. *Leavenworth Co. v. Miller*, 7 Kans. 479. It would seem to follow that the public has a right to say that they shall not be permitted, though private corporations, to make any contract which would prevent them from accommodating the public in the

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matter of transportation and travel." In that case it will be observed that the contract was not to build a depot within certain limits.

In *Fuller v. Dame*, 18 Pick. 472, Chief Justice SHAW, in delivering the opinion of the court, says: "It is obnoxious that if one large landholder may make a valid conditional promise to pay a large sum of money to a stockholder, or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other great landholders may make like promises, or similar conditions and great public works which should be conducted with a view to the public interest and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a necessary conflict of separate local and private interests." And a note given to a stockholder in the nature of a bribe was declared void. We fully approve of that decision, and if it should appear that the lots in question were conveyed for the purpose of bribing the railroad company there can be no recovery in the action. But this purpose will not be presumed, and if such was the object of the conveyance the facts can be set up in answer. It is said that the petition is defective by reason of the failure to allege that the railroad company required the conveyance to be made gratuitously. The allegations of the petition are in substance that the company required the plaintiff to convey the lots described, and that thereupon, in pursuance of the contract, he conveyed the same gratuitously. The statement is not as definite as could be desired, but under the liberal rules of construction established by the Code it may be inferred that he was required to convey the lots gratuitously. The judgment of the District Court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

LAKE, C. J., dissenting. I fully concur in the foregoing opinion as to the first and main proposition discussed therein, but dissent from the last. I do not think the petition states a cause of action for want of an averment that the railroad company required a "gratuitous" conveyance of the lots by the plaintiff. This fact is not properly inferable from any thing that is alleged.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

CHATAUD V. O'DONOVAN.

(80 Ind. 20.)

Landlord and tenant — bishop and priest — occupancy of real estate.

▲ Roman Catholic priest, in charge at the will of the bishop, and occupying a dwelling-house belonging to the church, is a servant and not a tenant, and his right of occupancy ceases with his service.

ACTION to recover real estate. The opinion states the case. The defendant had judgment below.

C. Foley, T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks, for appellant.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellee.

WOODS, J. Action by the appellant to recover of the appellee the possession of certain real estate. The Circuit Court sustained a demurrer for want of facts to the complaint, and error is assigned upon that ruling.

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The complaint shows that on the 20th day of July, A. D. 1876, the Right Reverend Maurice De St. Palais was, and for many years immediately preceding that date had been, the Roman Catholic bishop of Vincennes, and as such bishop had ecclesiastical authority, jurisdiction and control of the Roman Catholic diocese of Vincennes, which diocese was then, and is now, composed of the counties in the State of Indiana lying south of the north lines of the counties of Vermillion, Parke, Putnam, Hendricks, Marion, Hancock, Henry and Wayne, in the State of Indiana, the county of Hendricks, in said State, being then and now one of the counties included within and composing a part of the said diocese. That according to the laws, rules, regulations and customs of the Roman Catholic church, it was then and continuously ever since has been, and is now, the duty of the person filling and occupying the position of bishop of the said diocese, as such bishop, to look after, supervise, manage and control the various Roman Catholic congregations in the diocese, and to look after, supervise, control, hold and own all the property, real, personal and mixed, in use by all of the Roman Catholic congregations in said diocese, particularly houses and lands used for religious worship, and for residences for pastors of such congregations, and to exercise authority over, and control the various persons in charge of such congregations as pastors thereof, in ministering to and serving such congregations as such pastors, and as such bishop, in the exercise of his discretion, to continue such persons as such pastors, suspend and remove them from their positions as such pastors, and deprive them of all their rights and privileges pertaining to such positions as such pastors. and when such persons shall be so suspended or removed from their respective positions as such pastors, then according to the said laws, rules, regulations and customs, it was and continuously ever since has been and is now, their duty to at once deliver up and surrender to the bishop of the said diocese all the property, real, personal and mixed, of which said persons had the occupancy or possession as such pastors of such congregations, at the time of such suspension or removal.

That on said 20th day of July, A. D. 1876, Thomas Corliss, Timothy Quinn and Martin Dugan, they then being the owners in fee simple of the real estate hereinafter described, together with their wives, executed to the said Right Reverend Maurice De St. Palais their deed of conveyance of that date, whereby they con-

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veyed and warranted to the said " Rt. Rev. Maurice De St. Palais, D.D., and his successors, in trust for the Catholic congregation of Brownsburg, Indiana," the said real estate, which deed was duly recorded on the 26th day of July, 1876, in the recorder's office of Hendricks county, Indiana. That " the Catholic congregation of Brownsburg, Indiana," was at the time an unincorporated congregation of members of the Roman Catholic church, and not organized pursuant to any law of the State of Indiana, and was then subject to the ecclesiastical authority, jurisdiction and control of the said Maurice De St. Palais as said bishop of said diocese of Vincennes, and was then and is now popularly known as St. Malachai's Roman Catholic Church, of Brownsburg, Hendricks county, Indiana.

That the said Maurice De St. Palais died on the 28th day of June, A. D. 1877, a resident of Knox county, in the State of Indiana, being at the time such bishop of the said diocese, and holding and owning the right and title conveyed to him by the said deed of conveyance to the said real estate, and leaving his last will and testament which was duly proven and admitted to probate at the said county of Knox, on the 28th day of July, A. D. 1877, whereby he did will and devise all his estate, whether real, personal or mixed, situated in said diocese of Vincennes, in the State of Indiana, or elsewhere in the United States of America, to Most Reverend John Baptiste Purcell, archbishop of Cincinnati, Ohio, and his heirs and assigns forever, in as full and ample a manner as he, the testator, had held and enjoyed the same, and for the like purposes, to wit: for the sole use and benefit of the Catholic Church of the diocese of Vincennes, Indiana, in the same manner and form as he had himself enjoyed the same, the said devisee being requested to convey all such estate as he received by the will to the testator's successor in his office as bishop of the diocese of Vincennes, Indiana, to have and to hold the same to him and his heirs and assigns forever, in the same manner and form and for the same uses as the testator possessed the same. That after the death of the said Maurice De St. Palais, to wit, March 26, 1878, the said Francis Silas Chatard was duly named and appointed by the head of said Roman Catholic church, the supreme pontiff, the pope at Rome, the successor of the said Maurice De St. Palais, as said bishop of Vincennes, and entered upon the discharge of the duties of that office and position, in the month of August, A. D. 1878, having all the ecclesiastical authority, jurisdiction and control of the said Roman Catholic

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diocese of Vincennes, that his predecessor had as such bishop, and having all of the duties to perform and discharge concerning and appertaining to the said position and office of bishop of the said diocese, that his said predecessor had to perform and discharge, according to the laws, rules, regulations and customs of the Roman Catholic church.

That after the said Francis Silas Chatard entered upon the discharge of the duties of the position of bishop of said diocese, as above mentioned, to wit, October 30, 1878, the said John Baptiste Purcell, archbishop of Cincinnati, Ohio, for the purpose of carrying into effect the said last will and testament of said Maurice De St. Palais, executed to the plaintiff his certain deed of conveyance, whereby he bargained, sold, granted, conveyed and confirmed to the plaintiff as bishop of said diocese of Vincennes, and as the successor therein and thereto of the said Maurice De St. Palais, and to the heirs and assigns of the plaintiff forever, all and singular, the estate of every kind and description, whether real, personal or mixed and wheresoever situated, that was devised to him, said Purcell, by the said last will and testament of the said Maurice De St. Palais, late bishop of said diocese, as aforesaid, which property said deed recited consisted of churches for religious worship, and personal property connected therewith, school houses, asylums for charitable uses and purposes, and all other property, real, personal or mixed ; all which property by the terms of said deed, the plaintiff, as bishop of said diocese, was to have and to hold to him, his heirs and assigns forever, in fee simple.

That at the time the said Francis Silas Chatard entered upon the exercise and discharge of the duties of the office and position of bishop of Vincennes, as aforesaid, and from that time continuously up to the present time, and at this time, the said county of Hendricks was, has been, and is now, situated within the said Roman Catholic diocese of Vincennes, and subject to the ecclesiastical authority, jurisdiction and control of the said Francis Silas Chatard, as such bishop of said diocese of Vincennes; and that according to the laws, rules, regulations and customs of the Roman Catholic church above mentioned, it was at that time and continuously ever since that time has been, and is now, his duty as such bishop to look after, supervise, manage and control the various Roman Catholic congregations within the said diocese, and to look after, supervise, control, hold and own all the property, real, personal and

mixed, in use by all the Roman Catholic congregations within the said diocese, particularly houses and lands used for religious worship and for residences for pastors of such congregations, and to exercise authority over and control the various persons in charge of such congregations as pastors thereof, in ministering to and serving such congregations as such pastors, and as such bishop, in the exercise of his discretion, to continue such persons as such pastors, suspend and remove them from their positions as such pastors, and deprive them of all the rights and privileges pertaining to such positions as such pastors, and according to the laws, rules, regulations and customs of the Roman Catholic church above mentioned, when such persons shall be so suspended or removed from their respective positions as such pastors, it was then, and continuously ever since has been, and is now, their duty to at once deliver up and surrender to him, the said Francis Silas Chatard, as the said bishop of the said diocese, all the property, real, personal and mixed, of which such persons respectively had the occupancy or possession as such pastors of such congregations, at the time of such suspension or removal; the authority, jurisdiction, rights, privileges and duties of the said Francis Silas Chatard as such bishop of such diocese, being the same as were the authority, jurisdiction, rights, privileges and duties of his predecessor, the said Maurice De St. Palais, while he, the said Palais, filled the position of and was the bishop of the said diocese, as above mentioned. That at the time the said Francis Silas Chatard entered upon the exercise and discharge of the duties of the position of bishop of the said diocese of Vincennes, to wit, in the month of August, A. D. 1878, as aforesaid, Dennis O'Donovan, the defendant, was filling the position of pastor of the said Roman Catholic congregation at Brownsburg, by appointment of the said Maurice De St. Palais, while he was filling the position of and was bishop of the said diocese of Vincennes, as above mentioned, the said appointment having been made, and the said Dennis O'Donovan having entered upon the discharge of the duties of the position of said pastor in the spring of the year, A. D. 1877, and was in possession of the said real estate, occupying and using for his residence the parsonage house situated thereon, and together with said congregation, occupying and using for the purpose of religious worship the house situated thereon, set apart for and dedicated to religious worship; such possession having been taken by the said O'Donovan in accordance

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with the laws, rules, regulations and customs of the Roman Catholic church, which required him as such pastor to occupy and use for his residence the parsonage house situated on the said real estate, and together with the said congregation, to occupy and use for religious worship the house situated thereon, set apart for and dedicated to religious worship, the better to enable the said O'Donovan to serve and minister to the said congregation as such pastor, so long as he should continue to be such pastor, but not for any longer time; such occupancy and use being necessary to the proper and better performance of the duties pertaining to said pastorate; said possession of said real estate, by the said O'Donovan, not being by any other right; and according to the said laws, rules, regulations and customs, and which were in force at the time, and have continued in force ever since said O'Donovan took such possession and are now in force, it would become the duty of the said Dennis O'Donovan, should he be suspended or removed from the said position as the said pastor of said congregation, to at once deliver up and surrender to the bishop of the said diocese the possession of the said real estate, so far as the same should be in his possession. That at the time said Dennis O'Donovan was appointed such pastor and took such possession of said real estate as aforesaid, he was a priest of the Roman Catholic church, and was well acquainted with all the laws, rules, regulations and customs of that church hereinbefore mentioned and referred to, and was then and ever since has been amenable, as a priest, to all of said laws, rules, regulations and customs.

That on the 15th day of December, A. D. 1880, acting in the exercise of his discretion and in the line of his duty as said bishop of the said diocese, he removed the said Dennis O'Donovan from the position of pastor of the said congregation of the said "St. Malachai's Roman Catholic Church, of Brownsburg, Hendricks county, Indiana," and deprived him of all the privileges and rights incident and pertaining to said position, and on the 26th day of April, A. D. 1881, he, the plaintiff, caused a written notice to be served on the defendant to deliver up to the plaintiff possession of the said real estate, at the expiration of one month from that time, but which removal, deprivation and notice the defendant has wholly disregarded, and without right and wrongfully and unlawfully continues in and retains and now has possession of the said real estate, and continues to reside in the pastor's residence situated

thereon, and holds possession of the house situated thereon, set apart for religious worship, keeping the same locked and fastened up, and with threats, menaces and force, preventing the priest sent by the plaintiff since the said removal and deprivation of the said O'Donovan, to the said congregation, to minister to them and to hold religious worship with them, from performing the said functions in the said house set apart for religious worship, situated on the said real estate as aforesaid, and in consequence the said priest so sent as aforesaid, and the said congregation, have been compelled to rent a hall in said town of Brownsburg, in which to hold, and in which said priest and congregation do hold their religious worship and perform their religious services. That the time designated in the said written notice served on the defendant, as aforesaid, to wit, one month, at the expiration of which to deliver up to the plaintiff possession of the said real estate, was reasonable time to have done so, the defendant being an unmarried man, and having no family but one servant. That the plaintiff is entitled to the possession of the said real estate, and that he is the owner thereof in fee simple in trust for the said congregation of St. Malachai's Roman Catholic Church of Brownsburg, Hendricks county, Indiana, and that defendant unlawfully keeps him out of possession thereof. Wherefore the plaintiff demands judgment for possession of the said real estate and for all general relief to which he is entitled.

We have no brief from the appellee. It is stated in the appellant's brief, that the ruling of the Circuit Court was put upon the ground that the facts alleged in the complaint showed the relation of landlord and tenant between the parties, and that sections two and three of the act concerning that relation (2 R. S. 1876, p. 338; R. S. 1881, p. 1128), made it a tenancy from year to year, determinable by a three months' notice prior to the expiration of a current year.

The question thus presented is plainly an important one, not only as the decision may affect the policy and administration of the affairs of the church directly concerned, and perhaps other church societies which furnish houses for the use of their pastors, rectors or preachers, but the owners and occupants of real property generally; for it is readily conceivable that in many instances the owner and the tenant will be in all essential respects in the same legal relation as the parties to this record, as for example, the ser-

vant brought into the dwelling or upon the premises of the employer, and as an incident to the employment, allotted a room or tenement to occupy while the service lasts; the mechanic or laborer who by the terms of his engagement has the possession or use of a house belonging to the employer, and for which the rent is to be deducted from his wages, or for which he is to pay no specified rent, makes compensation only by accepting less wages than he would receive if he occupied a house of his own.

While these supposed cases, like the one before us, show the parties in relations somewhat like the ordinary relation of landlord and tenant, they are yet clearly and broadly distinguishable therefrom.

The case of *Kerrains v. People*, 60 N. Y. 221; s. c., 19 Am. Rep. 158, is instructive. It was there held that "Where the occupation of a house by a servant is connected with the service or is required by the employer for the necessary or better performance of the service, the occupation is as servant, not as tenant, and the possession is that of the master." In the course of the opinion in the case, CHURCH, C. J., says: "Such was clearly the case of *Haywood v. Miller*, 3 Hill, 90, where a farmer hired a man and his wife to work a farm for wages. The occupation of the house was necessary to the performance of the service; and *People v. Annis*, 45 Barb. 304, was substantially the same, although I am unable to agree with the learned judge who delivered the opinion in that case that immediately upon the termination of the service a tenancy at will, or by sufferance, springs up. * * * The question depends upon the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance. And this, I think, is the result of all the cases. The question has often arisen in England, under the poor laws to determine what occupation would confer a settlement, the courts recognizing as controlling, the distinction between an occupation as a tenant or as a servant." (Cases cited) 'The case of *Hughes v. Chatham*, 5 M. & G. 54, arose under the reform act, requiring a registry of voters, the statute requiring that the person should occupy as owner or tenant. * * * TINDAL, C. J., in delivering the opinion of the court, said: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in

fee for years or at will, or for any other estate or interest, and if he do so, the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration.' * * * 'And as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and as the case expressly finds that he had the house as part remuneration for his services, we can not say that the conclusion at which the revising barrister has arrived is wrong.'"

"I have cited the language of the court," says CHURCH, C. J., "because it lays down concisely the correct rule for determining the question involved in this class of cases." And proceeding with a recital of the facts in the case before him, adds: "The inference from these facts is reasonable if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employee for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer who hires a laborer for wages, to work his farm and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts."

"Many servants," says MANSFIELD, C. J., in *Rex v. Stock*, 2 Taunt. 339, "have houses given them to live in, as porters at park gates: if a master turns away his servant, does it follow that he can not evict him till the end of the year?" To the same effect see *McQuade v. Eimons*, 38 N. J. 397; *Doyle v. Gibbs*, 6 Lans. 180.

While it may not be said, upon the facts of the complaint, that the defendant was the hired servant of his bishop, it does appear that he was appointed to his position by and held it at the discretion of the bishop, and that his possession of the property was only an incident to his appointment, the better to enable him to discharge the duties of his office, and when in the exercise of that discretion, which by the rules and customs of the church he had the right to employ, the bishop removed the defendant from his charge or pastorate over the congregation, his right to possession of the property at once necessarily ceased.

If under the circumstances the parties should be deemed to have

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come under a contract relation to each other, the plain meaning of the contract was that when the defendant should cease to be pastor, which might be at the will of his bishop, he should cease forthwith to occupy the property, there being from the nature of the case no right of occupancy except as an incident to the performance of the duties of pastor. And if this be regarded as a tenancy, it was a tenancy at will, and determinable "by one month's notice in writing, delivered to the tenant," which notice the complaint shows to have been given.

We are however of the opinion that the relation of the parties was more like that of master and servant—the possession of the priest being in fact, the possession of his superior the bishop, who had power at any time and upon his own judgment or discretion, to remove one and install another in the office of pastor, and in the possession of the property of the office.

The judgment is reversed with costs. and with instructions to overrule the demurrer.

Judgment reversed.

STATE V. HAMMOND.

(80 Ind. 80.)

Criminal law — blackmailing — threat in order to compel payment of debt.

A threat to accuse another of crime, if made for the purpose of inducing payment of a just debt, is not within the statute of blackmailing.

INFORMATION of blackmailing. The opinion states the case. The information was quashed below.

D. P. Baldwin, attorney-general, *O. W. Watkins*, prosecuting attorney, for State.

J. B. Kenner and *J. I. Dille*, for appellee.

WORDEN, J. Information against the appellee, based upon affidavit, charging that "one Nathan Hammond, on the 3d day of November, 1881, at the county of Huntington and State of Indiana, did then and there unlawfully, feloniously and knowingly

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send a certain written communication, with the name of the said Nathan Hammond subscribed thereto, to one Alfred H. Wintrode, and did then and there thereby accuse and threaten him, the said Alfred H. Wintrode, to accuse him, the said Alfred H. Wintrode, of the crime of having obtained money from him, the said Nathan Hammond, through false pretenses, which said written communication was in these words, that is to say:

‘DORA, IND., Nov. 3, 1881.

‘MR. ALFRED WINTROAD:

‘Sir — I want you to pay me that money that you got to go to California on in ten days from this date, as I am prepared to prove that you got it under false pretenses, for I can prove by a man that saw you have the money, that you had other money before you left here that you could of used to go on, also the \$70 dollars that you got in California. I can prove a pine blank that you had the money or a check for money at the very time you got it, and Mr. Bryant says he had no arrangement to send you any money, and that you got that under false pretense. Now if you do not make arrangements to settle it in ten days I propose to prosecute you to the full extent of the law for obtaining money under false pretenses to defraud me, you can settle it by giving your note with good security payable in ninety days with interest from the date of the receipt of the money, if you do not you will find yourself in a very close place as it is a penitentiary crime. I have three of the best council that can be got in Wabash and Huntington. Yours, Nathan Hammond.’ Such written communication was inclosed in an envelope and addressed thus: ‘Mr. A. H. Wintroad, Huntington, Indiana,’ and was mailed at and in the post-office Dora, at and in Dora, Wabash county, Indiana, and was received by the said Alfred H. Wintrode in the ordinary course of mail at the post-office Huntington, Huntington county, Indiana; and which charge and charges and accusations so made in such written communication, which if true, would constitute a crime punishable by law, which crime so charged and accusation so made was to and of the said Alfred H. Wintrode, and the Alfred Wintroad so accused in said written communication is the same as Alfred H. Wintrode, and the said Nathan Hammond intended and meant to accuse and did accuse Alfred H. Wintrode in his communication addressed to Alfred Wintroad, with intent then and thereby feloniously, unlawfully and knowingly to extort and gain from him, the said Alfred H. Wintrode, the sum of one

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hundred dollars in lawful current money of the United States." There were further allegations intended to show the right to put the defendant on trial upon affidavit and information, which need not be noticed.

On motion of the defendant, the information was quashed and he was discharged. The State excepted. Error is assigned here upon the ruling below.

The proceedings were founded upon section 1926, R. S. 1881, which provides as follows : "Whoever either verbally or by any letter or writing or any written or printed communication, demands of any person, with menaces of personal injury, any chattel, money, or other valuable security ; or whoever accuses or threatens to accuse, or knowingly sends or delivers any letter or writing or any written or printed communication, with or without a name subscribed thereto, or signed with a fictitious name ; or with any letter, mark, or designation, accusing or threatening to accuse any person of any crime punishable by law, or of any immoral conduct, which, if true, would tend to degrade and disgrace such person, or in any way to subject him to the ridicule or contempt of society ; or to do any injury to the person or property of any one, with intent to extort or gain from such person any chattel, money, or valuable security, or any pecuniary advantage whatsoever ; or with any intent to compel the person threatened to do any act against his will, with the intent aforesaid — is guilty of blackmailing, and shall, on conviction thereof, be imprisoned in the State prison for not more than five years nor less than one year, to which may be added a fine not exceeding one thousand dollars."

It may be fairly inferred from the letter sent by the defendant to Wintrode, that the latter was indebted to him for the money mentioned, and that the object of the defendant was merely to obtain or secure the repayment of it. The existence of such indebtedness is not negatived in the information.

The question arises then, whether the statute applies to such case.

We are of opinion that a threat to prosecute for an alleged or supposed offense connected with the creation of a debt, where the object of the threat is merely to secure the payment of the debt due from the person threatened to the person making the threat, does not come within the spirit or purpose of the statute.

The authorities upon the point are not abundant, but the view we

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have taken is sustained by the case of *People v. Griffin*, 2 Barb. 427. See also, as bearing remotely upon the question, the case of *Brabham v. State*, 18 Ohio St. 485.

No error was committed in quashing the information.

The judgment below is affirmed.

Judgment affirmed.

HUNT V. ELLIOTT.

(80 Ind. 245.)

Contract — statute of frauds — public policy.

An oral agreement that the one of two joint mortgagees of personal property shall buy it at judicial sale, the other not attending nor bidding, and shall hold, use and dispose of it for the benefit of both, is not within the statute of frauds nor against public policy.

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

M. Way, — Cheney and E. L. Watson, for appellant.

H. H. Patty, W. A. Thompson; A. O. Marsh, J. W. Thompson and J. H. Jordan, for appellees.

FRANKLIN, C. Appellees sued appellant for damages for the breach of a certain contract in relation to the bidding off certain property at a sheriff's sale upon the foreclosure of a mortgage held by appellees. There was a demurrer overruled to the first paragraph of the complaint. Issue formed, trial by jury, and a verdict for appellees. Over a motion for a new trial, judgment was rendered for appellees for \$125.

The errors assigned and complained of are the overruling of the demurrer to the first paragraph of the complaint, and the overruling of the motion for a new trial.

The reason assigned in the motion for a new trial, the ruling upon which is complained of, is error of the court in its instructions to the jury.

The objection urged against the first paragraph of the complaint

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is that the contract sued upon is void, for the reasons : 1st, that it is contrary to public policy ; 2d, that it is within the statute of *frauda*. The second paragraph of the complaint was a common count, and need not be further noticed, as no evidence was given under it.

The substance of the first paragraph, to which the demurrer was overruled, is as follows: That on the 22d day of January, 1877, and prior thereto, appellee Minerva Elliott was the owner of a one-half interest in a portable saw-mill, etc.; on that day she sold the same to one Bradstreet, he then owning the other half, and took his three notes for the balance of the unpaid purchase-money, and a chattel mortgage on the mill to secure the payment of the same, which mortgage was duly recorded; two of the notes were for \$100, each, and the other for \$72.50; that she sold the last-named note, and after passing through the hands of another, it was finally indorsed to appellant; that she foreclosed the mortgage, but at the time of the foreclosure did not know that appellant held the note, and he was therefore not made a party to the foreclosure suit; that there was a prior mortgage on said mill in favor of Bayless Vaughn & Co., which had been foreclosed for \$250.65; that appellee Minerva Elliott caused a copy of the decree to be issued on her judgment of foreclosure, and the property to be advertised for sale on the same; that appellant, on learning these facts sent his agent Ludy to Lewis O. Elliott, as agent and husband of Minerva, and said agents, for and on behalf of their said principals, entered into an agreement in substance as follows: That for the purpose of securing the payment of the note which had been indorsed to appellant, the appellee Minerva should not attend and bid on the property at the sheriff's sale; that appellant should bid off the same as low as he could, take the mill and run the same, and furnish the appellee Lewis O. Elliott work in the mill at \$1.25 per day, replevy and finally pay the judgment and costs in favor of the said Bayless Vaughn & Co.; that when the earnings of said mill had been sufficient to pay the note held by appellant and the interest thereon, the Bayless Vaughn & Co. judgment of foreclosure, and the incidental expenses of running the same, then the appellant and appellee Minerva Elliott should each own the undivided one-half of said mill, etc.; and it was also further agreed that if the said Minerva Elliott should before the said earnings of said mill had been sufficient to pay appellant said sums above named, find a purchaser

for said mill, who would take the same and pay appellant said sums which he had paid and was coming to him, he should then deliver said mill to said purchaser, and said appellee should cause said purchaser to pay said sums to said appellant, except such part of said sums as had been paid out of the earnings of said mill; that in pursuance of said agreement, said Minerva did not attend or bid at said sale, but appellant did bid off said mill, subject to the first mortgage lien, at and for \$10; that appellant ran and operated said mill for one year; that he refused to employ said Elliott to work, and made \$1,000 out of the earnings of the mill, which was more than enough to pay the expenses of running the same, and the several sums above named, which appellant was to pay; that after appellant had run the mill for some time, appellee Minerva found a purchaser for said mill, and she requested the appellant to deliver said mill to said purchaser upon his complying with said agreement, all of which appellant refused, and converted the same to his own use; that said mill property was then of the value of \$1,000; that appellant refused to let appellees have any thing to do with said mill or account to them in any way therefor, but sold the same for the sum of \$1,000 and appropriated the proceeds to his own use.

There being no averment in the complaint that this agreement was in writing, and there being no copy filed therewith, the presumption is that it was in parol. *Krutz v. Stewart*, 54 Ind. 178; *Langford v. Freeman*, 60 id. 46; *Goodrich v. Johnson*, 66 id. 258.

The first question that arises is, was this agreement void by reason of its being contrary to public policy?

It is well settled that a combination and agreement, between parties at a public sale by auction, not to bid against each other, or to use any artifice or other means to prevent others from bidding, for the purpose of chilling or depressing the sale, and buying the property at a sacrifice, for less than it is worth, is a fraud upon the owner, contrary to public policy and void. But we think it is equally well settled that there may be a joint bidding in the name of one, by joint lien-holders, for the purpose of securing all the lien-holders by participating in the effects of the sale. And where such is the case an agreement between them not to bid against each other is not contrary to public policy, the object being to secure all the liens so far as can be, and not to make the property sell for a less price. If it did have the effect to reduce the price at the sale, that would be an incident and not the purpose of the agree-

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ment. In the case at bar there was no effort made by either of the parties to prevent others from bidding at the sale. Appellee did not attend the sale, but relied, under the agreement, upon her debt being secured by the property being bid off in the name of appellant. They were both lien-holders, having the same mortgage upon the property. Appellee's foreclosure judgment did not merge her mortgage lien in the judgment; it still continued. *Lapping v. Duffy*, 47 Ind. 51; *Goddard v. Renner*, 57 id. 532; *Cauthorn v. Indianapolis, etc., R. Co.*, 58 id. 14.

There is nothing in the complaint that shows appellee intended to or would have bid upon the property but for the agreement, or that the property sold for less than it would have sold had there been no such agreement. Without the agreement, perhaps appellee might have procured some person who was able to pay off the older incumbrances, to bid off the property at a sum sufficient to have paid her debt, but her not having done so either with or without the agreement, could not be construed into a fraud upon the owner, he being declared insolvent, nor as against public policy. *Smull v. Jones*, 1 W. & S. 128; *Smull v. Jones*, 6 id. 122; *Holmes v. Holmes*, 3 Rich. Eq. 61; *Hamilton v. Hamilton*, 2 id. 355.

Where a contract is susceptible of two constructions, one legal and the other illegal, it should be presumed to be legal, and the court should give it the legal construction and uphold the contract. And where the illegality is based upon a question of fraud, and the fraud charged does not clearly appear upon the face of the contract, as a question of fact it should be left to the jury upon the trial, and not be decided on a demurrer. The intention and purpose of the parties are to be considered in construing the agreement. *Herman on Executions*, 317, § 205; *Phippen v. Stickney*, 3 Met. 384; *Young v. Snyder*, 3 Grant Cas. 151; *Buckner v. Chambliss*, 30 Ga. 652; *Guernsey v. Cook*, 120 Mass. 501; 2 Chitty on Cont. 979; *Moak's Van Santvoord's Pleadings*, 349.

In *Freeman on Executions*, § 297, we find the following: "But it does not necessarily follow, because one person bids for the benefit of himself and others, or because two or more persons join their capital for the purpose of making a purchase at such sale, that there has been an unlawful or fraudulent combination. * * * Other instances frequently occur in which two or more persons may lawfully unite in making a purchase. In fact the union of two or more persons in purchasing at an execution sale seems never to be

condemned, unless the court conceives that its object is to prevent competition, rather than to engage in the joint prosecution of an honorable business enterprise."

In Herman on Executions, *supra*, the following language is used: "But if the purposes of the agreement be to enable each of the parties to become a purchaser of the property offered for sale, not desiring the whole, or if the agreement be for any other honest or reasonable purpose, it is not void. An agreement between creditors, for whose benefit an assignment in trust of a chattel mortgage has been made, and the assignee that at the sale at auction, under the mortgage of the property covered thereby, the assignee shall bid the same in, and if any of the creditors bid on any of the articles sold, the assignee shall assume their bids and hold all the property so purchased, and apply it to the payment of debts, is not contrary to public policy as intending to prevent competition at a public sale."

Appellant has brought this case to this court without the evidence and asks this court to decide upon the face of the agreement that it is against public policy and void. If this does not clearly appear, he should have done by answer and proof at the trial what he now asks this court to do upon the pleadings. Fraud in fact is never presumed, but must be proven by the party who charges it. *Farmer v. Calvert*, 44 Ind. 209; *Stewart v. English*, 6 id. 176; *Tenbrook v. Brown*, 17 id. 410.

Rorer on Judicial Sales, 43, § 77 (2d ed.), says: "Several persons may join together and lawfully bid as a unit, if done in good faith. 'It is not every joint bidding or partnership among bidders at a sale under a decree in chancery * * * that is corrupt and fraudulent. Such a joint or partnership bidding may be perfectly legitimate.'"

The case of *Switzer v. Skiles*, 3 Gilm. 529, is a leading case, and directly in point upon the present as well as subsequent propositions in this case, in which it was held: "Where a sale of land is made at public auction, and all persons are at liberty to bid, an agreement among different claimants to different portions of the land with an individual to purchase the whole tract for their benefit, is not such an agreement as is calculated to prevent competition and thereby to render the sale void." The court uses the following language: "Another cause of demurrer is, that the agreement respecting the purchase of the land was contrary to the policy of the

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law, and therefore void. There is no force in his objection. It is difficult to conceive in what manner the government was prejudiced by the making or the carrying into effect of the agreement. It amounted simply to this: that Haight should attend the sale and purchase the land for the benefit of those having improvements thereon. The sale was at public auction, and of course all persons were at liberty to bid. This agreement was not calculated to prevent competition, and in that way lessen the price the government might obtain."

It will be observed that that case was between the parties to the agreement and for the purpose of enforcing it.

In the case of *Smull v. Jones*, 1 W. & S. 128, the court held that lien creditors may purchase jointly at sheriff's sales. A combination of interests for that purpose is not necessarily corrupt. But to make the transaction fraudulent it must amount to a conspiracy to depress bidding.

This case was again before the Supreme Court of Pennsylvania, and is reported in 6 W. & S. 122. On page 126, it is said of the court below: "The court on the contrary ought to have told the jury that such an agreement was perfectly lawful, and therefore would not avoid the sale. It would be repugnant to every principle of common sense, reason and law, to say that two or more and especially judgment or lien creditors of a debtor, whose real estate had been taken in execution and was about to be sold by the sheriff, could not agree to become joint purchasers thereof, provided it were not bid for by others beyond a fixed sum, and that one of them should bid in his own name for the common use of all of them. But it is said that such an agreement in its effect prevents competition, and therefore inevitably tends to depress the price for which the property would otherwise be sold, to the injury of the debtor and the other creditors. Admitting this to be true in part, which is all that can be claimed at most, what right has the debtor or have the other creditors to demand and require that there shall be a competition, either among the creditors of the debtor or among those who are not of his creditors? * * * Every man must be left to act as he pleases in such case; that is, either to bid singly for the property, if he wishes to buy, and be able, or to unite with others, as he may think it most suitable to his means, and most advantageous to himself in any other respects. But it is far from being true that every agreement of the kind has a necessary ten-

dency to lessen the price that otherwise might be obtained for the property at the sale; on the contrary it may tend to increase it."

In the case of *Holmes v. Holmes*, 3 Rich. 61, the court uses the following language: "It is not every joint bidding or partnership among bidders, at a sale under a decree in chancery, that is corrupt and fraudulent. Such joint or partnership bidding may be perfectly legitimate. To render them unlawful and void there must be a fraudulent intent to depress and chill the sale, to obtain the property at an under value, or to obtain other undue and unconscientious advantages. * * * A fraud in a case like this as in every other case, must be judged of by all the attendant circumstances. If the co-partnership in bidding appears from the attendant circumstances to have been entered into with a fraudulent intent to depress and chill the sales, and to obtain undue advantages in the purchase of property, the sale will be vacated. If such joint bidding has no such fraudulent intent and is *bona fide* it will not have the effect of vitiating the sale." See also *Hamilton v. Hamilton*, 2 Rich. Eq. 355; *Smith v. Greenlee*, 2 Dev. 126 (18 Am. Dec. 564); *National Bank, etc., v. Sprague*, 20 N. J. Eq. 159, 168-9.

In the case of *McMinn v. Phipps*, 3 Sneed, 195, the court, in speaking of an agreement not to bid against each other, says: "Upon the first proposition there can be no doubt that if the land had been divided into three lots and sold separately, and Mr. Taylor had desired to purchase lot No. 1, Mr. Springfield lot No. 2, and Mr. Degraffenried No. 3, and they had agreed among themselves that neither should bid against the others for the lots they desired to purchase respectively, such an agreement would have been a fraudulent combination to avoid competition, and the sales would have been voidable. * * But such is not this case. Here the whole tract was to be sold together, and each of the parties wanted certain portions of it, but neither wanted to purchase it all. Hence they entered into an agreement to purchase jointly, and to make a division among themselves so as to suit the convenience of each. Such an agreement is not a fraudulent combination to stifle competition, nor is it against public policy or strict morality." In that case the court approvingly cites 2 Dev. L. 126. In the case of *James v. Fulcrod*, 5 Tex. 512, it was agreed between two that one should bid off a lot for the use of both; the one bid off the lot, and refused to keep the agreement. The court held the agreement valid, and after citing many authorities say: "The facts set forth

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in the petition show no fraudulent combination or artifice to stifle fair competition, to the injury of the vendor or to secure the lot at less than its value."

In the case of *Buckner v. Chambliss*, 30 Ga. 658, the court below took the same view of the law that appellant's learned counsel do, and told the jury below as a matter of law, that if defendants "combined not to bid against each other, the sale was void." In reviewing the action of the court below, the Supreme Court say of this: "It was equivalent to saying that persons could not buy property at sheriff's sale on joint account, for every agreement to buy on joint account implies an agreement that they will not bid against each other. There is no such rule of law as that. If they had used any means unfairly or fraudulently to prevent other persons from bidding for the property, that would have defeated the sale as to them."

Bishop on Contracts, section 481, contains the following: "Partners, or persons contemplating a partnership as to the particular thing; several, who each want a part, and not the whole, of the thing, and are to divide it between themselves; and others whose object is not an undue advantage but a fair purchase, may enter into a valid arrangement for one to bid and the rest abstain."

The case of *Phippen v. Stickney*, 3 Met. 384, is, perhaps the leading case upon this subject, and is cited and relied upon by both sides in this case. And after reviewing the authorities on this question, the court use the following language: "It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we can not judicially declare that every contract between two or more individuals, in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall when attempted to be enforced for the benefit of the associates, be held void as a fraud upon the rights of the vendor and against public policy, merely because he who seeks to enforce the contract may have been thereby induced to abstain from bidding. * * * The extent to which the doctrine of invalidating such contracts can be safely carried would rather seem to embrace within the rule all cases of fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property. Beyond this, the applica-

tion of the principle contended for may be found productive of mischief and an unwarrantable interference with the course of business in auction sales. We are therefore of the opinion that an agreement between A. & B., that A. will permit B. to become the purchaser of certain property about to be offered at sale at public auction, and that A. shall participate with B. in the benefits of the purchase, will or will not be fraudulent, as the circumstances of the case show innocence of intention or a fraudulent purpose in making such agreement."

Bigelow on Frauds, p. 142, has the following language : " Parties may purchase jointly at public sales, if all be open and fair. A combination of interests is not necessarily corrupt. It is the end to be accomplished which determines whether a combination is lawful or otherwise. If it be to depress the price of property by artifice the purchase will be void ; if it be to raise money for payment, or to divide the property for the accommodation of the purchasers, it will be valid." *Breslin v. Brown*, 24 Ohio St. 565 ; s. c., 15 Am. Rep. 627 ; *Smith v. Greenlee*, 2 Dev. 126 ; *Atcheson v. Mallon*, 43 N. Y. 147 ; s. c., 3 Am. Rep. 678. We do not find that this precise question has heretofore been before this court. The cases of *Bunts v. Cole*, 7 Blackf. 265 ; *Plaster v. Burger*, 5 Ind. 232 ; *Forelander v. Hicks*, 6 id. 448, and *Gilbert v. Carter*, 10 id. 16, are all in relation to preventing third parties at the sale from bidding.

From the foregoing authorities we come to the conclusion that the agreement in the case at bar is not fraudulent and void on its face, as being against public policy. And if it was fraudulent in fact it was necessary that the appellant should allege that in his answer and prove it upon the trial. In the case of *Phippen v. Stickney*, *supra*, the court held as follows : " In the case before us, upon the facts stated, we do not feel authorized to set aside this agreement as illegal or fraudulent upon the principles we have stated. Fraud is not to be presumed, where the contract is, on the face of it, consistent with honesty of purpose and fair dealing. If the defendant would avail himself of a defense of that character, it must be upon the findings of a jury, or upon a case stated by the parties clearly disclosing such fraudulent purpose. This contract might have been entered into by these parties for good and justifiable reasons, and it is not therefore to be deemed fraudulent and void upon the face of it."

In the case of *Bradley v. Kingsley*, 43 N. Y. 534, the court say :

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“ No principle or authority warrants a court to pronounce such an arrangement fraudulent, as a matter of law.”

In the case of *James v. Fulcrod*, 5 Tex. 512, the court say : “ Had the question arisen otherwise than on demurrer, and had it been shown that the lots generally sold at rates higher than the fixed limit, and that the effect of this agreement prevented the property from attaining its full price — and this could have been affirmatively proven—the transaction would have been repugnant to public policy, and consequently null and void. But as the case is presented, the agreement is most clearly within the specific qualifications of the rule as found in the cases of *Smith v. Greenlee*, 2 Dev. 126, and *Phippen v. Stickney*, 3 Met. 384.” See also Bigelow on Fraud, 142; *Goss v. Austin*, 11 Allen, 525 ; *Smull v. Jones*, 1 W. & S. 128 ; Moak’s Van Santvoord’s Pleadings, 563.

Thus we see that the authorities hold that the court, as a question of law, cannot hold such contracts illegal and void, if they are susceptible of a construction that makes them legal ; but the question of the fraudulent or illegal intent is one for the jury. There is nothing in the objection, incidentally mentioned, that the agreement was without consideration. All the authorities heretofore cited recognized the agreement as being based upon a sufficient consideration.

The last objection to the complaint is that the contract is within the statute of frauds, because it is a contract for a future sale, and that the property sold or to be sold is of the value of more than fifty dollars. We think there is no element of a sale or of a contract for a future sale between the parties in the contract set out in the complaint. The agreement between the parties is, that when the net earnings of the mill were sufficient to pay certain debts and claims, each was to own one-half of said mill ; but if before the net earnings amounted to such a sum, appellee Minerva should find a purchaser, appellant should deliver the mill, and appellee Minerva should cause said purchaser to pay appellant certain sums agreed upon. It was not an agreement that appellant should sell in the future. But he holding as trustee, upon appellee Minerva’s causing a purchaser to pay to him said sums, at her request, he was to deliver said mill to the purchaser, or if she found no purchaser, they were to become joint owners of the property. Appellee Minerva had a lien on this property; it was advertised to be sold to satisfy this lien; for the accommodation of appellant, she arranged

with appellant that he should bid off the property and hold it on the terms agreed upon. By the sale the amount of appellee Minerva's foreclosure judgment (\$200) may be said to be invested in the property, and appellant's \$82.50, his note and bid also were invested in the same. Bradstreet being insolvent, they could look alone to the property for payment. And after that appellant held it in trust.

A trust may arise or be created with reference to personal property the same as real estate, and the same rules obtain, except as to personal property it may be in parol; trusts concerning real estate only are required to be in writing. 1 R. S. 1876, 915, § 1; Hill on Trustees, 44; 1 Perry on Trusts, § 67.

A number of the cases cited in this opinion, showing that the contract is not void as against public policy, also hold that such a contract creates a trust in the one who bids off the property, and the agreement is not within the statute of frauds.

In the case of *Miller v. Robert*, 18 Tex. 16, it was held, that where one party furnishes another funds with which to buy lands for him or for them jointly, it creates a trust, and is not within the statute of frauds. It is not a contract for the sale of land. Also where one party was to furnish land certificates, and the other to perform the labor and pay expenses, and have a share in the land, this was a contract to acquire jointly, and the party in whom the title rests holds in trust for his co-tenant. *Gibbons v. Bell*, 45 Tex. 417; *Smock v. Tandy*, 28 id. 130; *Jenkins v. Frink*, 30 Cal. 586.

If two parties, each having written title to a tract of land, purchase a supposed better title, under an agreement to divide the premises, the one who takes the title is estopped to deny the right of the other to a moiety of the land. *Rupp v. Orr*, 31 Penn. St. 517; *Cook v. Cook*, 69 id. 443; *Smiley v. Dixon*, 1 Penn. 439.

In the case of *Arnold v. Cord*, 16 Ind. 176, it was held that "A person agreeing verbally to bid in land for another at sheriff's sale, shall be bound and decreed to hold in trust, though he took the title in his own name, and plead the statute of frauds in bar." *Denton v. McKenzie*, 1 Desaus. 289 (1 Am. Dec. 664).

"Where A. agrees with B. to purchase property at sheriff's sale for B., and he purchases the property, but takes an absolute conveyance to himself and refuses to convey to B., the latter, not being privy to the conveyance, is not bound by it and may prove the trust by parol.' *Strong v. Glasgow*, 2 Mur. 289. A Court of Chancery

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relieves against fraud by converting the person guilty of it into a trustee for those injured thereby."

Appellant, acting as the agent of appellee Minerva and for himself, under the contract set out in the complaint, in effecting this purchase, and appellee confiding in his promises and assurances, and relying upon the contract, ceased to give any attention to the sale of the property. Appellant bought and then refused to allow appellee to participate in the results or profits of the sale, according to the contract, and takes the property and converts it to his own use. A court of equity will not allow appellant to obtain and hold title to property and convert it to his own use under such circumstances, and to thus sacrifice and disregard the interests of those for whom he acted, but will convert him into a trustee for the appellee. *Switzer v. Skiles, supra*; 1 Perry on Trusts, § 166; Browne on Stat. of Frauds, § 96'a. In such case equity creates a constructive trust not within the statute of frauds, which may be established by parol evidence. See *Cox v. Arnsmann*, 76 Ind. 210. But if this contract was within the statute of frauds, it was so far executed that equity would estop appellant to take advantage of it, by pleading the statute of frauds as a defense. Browne Statute of Frauds, §§ 448 and 448a, and authorities therein cited.

"A court of equity will not permit the statute of frauds to be set up as a defense by a party infected with fraud. And parol trusts in real estate have been frequently established in direct contradiction of the statute, on the ground of fraud." *Arnold v. Cord, supra*; *Teague v. Fowler*, 56 Ind. 569.

We think the first paragraph of the complaint stated facts sufficient to withstand a demurrer. And there was no error in the overruling of the demurrer had.

[Omitting minor matters.]

We find no error in this record; the judgment below ought to be affirmed.

Per Curiam. It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is in all things affirmed, with costs.

Judgment affirmed.

SMITH V. MARTIN.

(80 Ind. 280.)

Contract — not to carry on business — breach.

An agreement by a milkman not to sell milk in a certain town is not broken by selling, at his farm outside that town and to persons residing outside that town, although with knowledge that the purchaser intends selling in that town.*

ACTION for breach of contract. The opinion states the case. The defendant had judgment below.

G. W. Paul and J. E. Humphries, for appellant.

E. C. Snyder, A. Thompson, T. H. Ristine and B. T. Ristine, for appellee.

MORRIS, C. This suit was brought by the appellant against the appellee upon the following contract :

“This agreement witnesseth : That David H. Martin and Rice Reid, of the first part, have sold and transferred one milk wagon and the appurtenances to the same, and dairy routes in Crawfordsville, Montgomery county, Indiana, to Vincent Smith, of the second part, and in said sale, as part of the consideration entering into said contract, the said Martin and Reid engage with said Smith that they will not engage in the dairy business in said town so long as said Smith shall continue in said business on his own account. Now, in pursuance of said agreement, the said Martin and Reid covenant and agree with said Smith, in the penalty of five hundred dollars, that they will not in any manner engage in dairy business or sale of milk in said town so long as said Smith shall continue in said business on his own account. And it is expressly agreed, that the said sum of five hundred dollars shall be the ascertained and liquidated damages due the said Smith from the said Martin and Reid, or either of them, if either of them shall violate their engagement in the premises, to be recovered against them or either of them as

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other debts are recovered by suit. And it is agreed that if said Smith shall sell said dairy this contract is to be void. Witness our hands and seals, this 5th day of November, 1878.

“D. H. MARTIN,
“RICE REID.”

It is averred in the complaint that the appellant had been, and continues to be, engaged in the dairy business and in selling milk in and about said town of Crawfordsville, which was known to the appellee ; that for a year last past the appellee has, in violation of said contract, been continuously engaged in keeping at his farm, adjacent to said town of Crawfordsville, nine milch cows, which produce a large quantity of milk, which the appellee sold and caused to be sold in said town of Crawfordsville, to wit : fourteen gallons per day. It is further averred that the appellee had been and is still furnishing to George Gunkle and Benjamin Oliver, who are rival dairymen to the appellant in said town, fourteen gallons of milk per day, to be sold in said town, and the appellee has been selling for a year past large quantities of milk to other dairymen, which he knew was to be sold by them in said town. The appellant demands judgment for \$500.

The appellee demurred to the complaint. The demurrer was overruled, and he then answered the complaint in four paragraphs, the first being withdrawn.

The paragraph of the answer numbered 2 admits the execution of the contract set out in the appellant's complaint ; states that the appellee owns a farm about one mile distant from the corporate limits of the town of Crawfordsville ; that ever since the making of said contract he has kept on said farm nine milch cows ; that he has, since the making of said contract, sold to said Gunkle and Oliver considerable quantities of milk on said farm, to wit : from six to eleven gallons per day ; that said Gunkle and Oliver were, at the time he sold them milk as aforesaid, engaged in selling milk in said town of Crawfordsville ; that he sold said milk to the said Gunkle and Oliver at his farm, and that neither of them resided in said town at the time ; that he never sold or furnished any milk to any one residing in said town ; that he never solicited any one living in said town to buy milk of him at his farm after the making of said contract, nor had he at any time sold milk on his farm to be sold to any one in said town, though those to whom he sold, were, so far

as he was concerned, at liberty to sell wherever and to whom they pleased.

The third paragraph of the answer is the same as the second, except that it states that the appellee had, at the time he entered into the contract sued on, nine cows on his farm ; that he could not dispose of them, and had to sell or waste the milk ; that he did not sell for the purpose of violating his contract or injuring the appellant, etc.

The fourth paragraph admits the making of the contract sued on, but alleges that the appellee is a farmer, residing on his farm one mile distant from Crawfordsville ; that he keeps nine cows ; that they produce a large quantity of milk, which he has sold on said farm ; but that he has not, since the making of said contract, sold any milk within the town of Crawfordsville, nor to any one living in said town, nor has he sold milk to any one to be sold in said town ; that the number of cows by him kept is not more than is usually kept on a farm of the size of his.

The appellant moved the court to strike out the third and fourth paragraphs of the appellee's answer, on the ground that they were in substance the same as the second. He also moved the court to strike out a part of the second paragraph of the answer. The motions were overruled.

The appellant replied by a general denial. He also replied specially, alleging that at the time the appellee made said contract he had but two cows on his farm ; that said Gunkle and Oliver were desirous of engaging in the business of selling milk in said town of Crawfordsville, but had no cows to produce the milk for said business ; that it was agreed between them and the appellee that the latter should purchase cows and furnish them fourteen gallons of milk twice a day ; that they should solicit custom and sell the milk in said town ; that the appellee was to have part of the profits of the business, to be paid by Gunkle and Oliver in the price which they were to give him for the milk to be furnished ; that in pursuance of said agreement, the appellee purchased the cows and furnished the milk as agreed, and the said Gunkle and Oliver sold the same in said town as promised, during the time mentioned in the complaint, which greatly damaged the appellant.

The appellee filed a demurrer to the reply, which was overruled. The cause was submitted to a jury for trial, who returned a verdict for the appellee. The appellant moved for a new trial. The

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motion was overruled and judgment rendered upon the verdict in favor of the appellee.

The overruling of the motion for a new trial is assigned as error. Other errors are assigned but they are all embraced in the one above stated.

There was no available error in overruling the appellant's motion to strike out the third and fourth paragraphs, and part of the second paragraph of the appellee's answer. If there was any error in overruling the motion it was harmless.

The first objection seriously urged to the ruling of the court is the refusal to give the third instruction asked by the appellant. But as all the instructions given by the court are not in the record, we must presume in favor of the action of the court that the ground of complaint was removed by other instructions given by the court of its own motion and in its own language. *Freese v. DePuy*, 57 Ind. 188; *Bowen v. Pollard*, 71 id. 177.

The court, at the instance of the appellee, gave the following instructions:

" 2. The defendant had a right to sell at his farm, outside of the town of Crawfordsville, milk produced by cows kept outside of the town of Crawfordsville, to persons living outside of the town of Crawfordsville, although he knew at the time of such sale that the persons to whom he sold the milk intended to and did sell the milk in the town of Crawfordsville.

" 3. Selling at his farm outside the town of Crawfordsville, milk produced by cows kept by the defendant outside of the town of Crawfordsville to persons residing outside of the town of Crawfordsville, knowing that the persons to whom it was sold intended to and did take it within the town of Crawfordsville for sale, and did in said town sell the same, would not be selling to a person to be sold in the said town of Crawfordsville. To constitute a selling to be sold within said town of Crawfordsville there must have been an understanding or agreement between the defendant and the person to whom the milk was sold, that the milk should be sold within the town of Crawfordsville. To make it a selling to be sold within said town, the understanding or agreement between the defendant and the person to whom the milk was sold must have been such that the person to whom the milk was sold could not sell it at any other place than in the town of Crawfordsville, without violating his agreement with the defendant. If the person

to whom the milk was sold was at liberty to, and could without acting in bad faith with the defendant, sell the milk to whoever he might choose, it would not be a selling to be sold in the town of Crawfordsville."

The appellee bound himself by his agreement with the appellant not to carry on the dairy business nor sell milk within the town of Crawfordsville. He did not engage not to sell milk or carry on said business elsewhere. Though the agreement should be fairly construed in view of the objects and purposes of the parties to it, yet it can not be enlarged by construction, so as to extend the limits of the district in which the appellee was prohibited from doing business. *Roller v. Ott*, 14 Kans. 609; *Harkinson's Appeal*, 78 Penn. St. 196; s. c., 21 Am. Rep. 9. The appellee could not under the contract establish a dairy and milk depot on his farm outside of the town of Crawfordsville, solicit custom from the town and supply its people with milk. But he might, without violating the letter or spirit of the contract, sell milk at any point outside of the town to any one not living in the town, and who could not be for that reason a customer of the appellant. It follows that if by the contract the appellee is not prohibited from selling milk outside of the town of Crawfordsville to persons not living in said town, the use which such persons might make of the milk purchased would not affect or in any way limit his right. Nor will his right to sell be controlled by his knowledge of the fact that the purchaser buys with the intention to resell within the prohibited territory. The purchaser would have the right to sell where he pleased; with this the appellee would have no concern unless interested in the sales made.

It follows that the court did not err in giving the instructions requested by the appellee. The appellant refers us to the cases of *Duffy v. Shockey*, 11 Ind. 70; *Sander v. Hoffman*, 64 N. Y. 248; *Davis v. Barney*, 2 Gill & John. 382; *Hubbard v. Miller*, 27 Mich. 15; s. c., 15 Am. Rep. 153. In the last case the question was as to the validity of the contract. In the case of *Sander v. Hoffman*, the court held very correctly, we think, that a party who had sold the good-will of the business of supplying meat to the people in a certain locality, and agreed not to carry on the business in that locality, could not open up a place for business outside of the inhibited district, receive orders there, and fill them by delivering the meat to the parties within the locality. In the case of *Davis v.*

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Barney, supra, the court held, laying much stress upon the word "indirect," as used in contract, that a party who had sold his interest as a stage proprietor, on the Washington and Baltimore road, and pledged himself not to be concerned "direct or indirect," in any line of stages in opposition, could not without violating his contract become instrumental in setting up or carrying on an opposition line of stages on said road, or aid in carrying on the same. The case of *Duffy v. Shockey, supra*, simply holds that a party who has agreed, for a sufficient consideration, not to start marble shops within a certain district, can not start such shops outside of such district, and then solicit custom within the district.

The instructions objected to proceed upon the ground that had the appellee solicited patronage from the people within the town of Crawfordsville, or sold milk to any one living without the town for the purpose of having it sold by such person within the town, he would have been acting in violation of the contract. The instructions are to the effect that a knowledge on the part of the appellee that the person offering to buy his milk intended to sell it in Crawfordsville, does not deprive him of the opportunity to dispose of his milk. That if his purpose is simply to sell his milk and not to cause it to be sold within the town, he does not by such sale violate his contract with the appellant. We think the instructions are as favorable to the appellant as he could ask.

The appellant excepted to the following instruction given by the court of its own motion:

"If you should find from the evidence that the defendant executed the contract sued on, that afterward he went into the business of furnishing milk to Gunkle and Oliver outside of the town of Crawfordsville, and the sales of such milk to Gunkle and Oliver were made without any understanding on the part of the defendant and said Gunkle and Oliver, that the defendant should have any interest in the sales made by them in the town of Crawfordsville, you should find for the defendant."

There was no error in this charge of which the appellant can complain. All the testimony in the case relating to sales of milk made by the appellee after the execution of the contract sued on, and before the commencement of the suit, had reference to the facts recited in the charge. If as stated in the charge the appellee had no interest in the sales of milk made by Gunkle and Oliver in the town of Crawfordsville, though he had sold them the milk

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disposed of by them within the limits of the town, he was not liable.

The testimony tended to support the verdict of the jury; it was not contrary to the evidence nor was it contrary to law. The judgment below should be affirmed.

Per Curiam. It is ordered upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

Judgment affirmed.

MITCHELL V. ROBINSON.

(80 Ind. 281.)

Master and servant — negligence — "alter ego."

Where an absent master carries on business by a superintendent with general powers, he is liable to an employee injured through the neglect of the superintendent in respect to machinery.

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

A. Dowling, D. W. Lafollette and W. W. Tuley, for appellants.

J. H. Stotsenburg, D. C. Anthony and J. V. Kelso, for appellee.

WOODS, J. The appellee recovered judgment against the appellants for personal injuries caused by the explosion of a steam boiler. The gist of the action was the alleged carelessness of appellants in using or permitting the use in their business of the defective boiler. The appellants saved exceptions to the overruling of their demurrers to the several paragraphs of the complaint, for want of facts, and now insist that each paragraph fails to show that the injury to the plaintiff occurred without fault on his part.

The first paragraph of the complaint charges, in this respect, that the defendants owned and were operating certain steam engines and other machinery in the prosecution of their business of slaughtering hogs; that at the time in question the plaintiff was in their employ, in the vicinity of the boilers connected with said machinery; that while the plaintiff was near the same, in the proper discharge

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of his duty, under his said employment, one of the boilers, connected with the engine and machinery aforesaid, without any fault of the plaintiff, and only by reason of the unsafeness, defectiveness and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom and fell upon the plaintiff, by reason of which the plaintiff was greatly injured, etc.

The second paragraph differs from the first only in the omission of the averment that the plaintiff was at the time of the accident in the employment of the defendants; and the substitution therefor of an allegation that he had been in the defendants' service and had returned to the premises at the request of the agent of the defendants with the view to further employment.

The third paragraph contains the same averments as the first, except as to the plaintiff's employment; it is stated that he had been employed by the defendants as a common laborer for some time previous, and that at the date of the accident he was upon the premises seeking employment.

[Minor matters omitted.]

It is further insisted that the verdict is not sustained by sufficient evidence, because the injury resulted from the carelessness of a fellow-servant of the appellee engaged in the same employment.

The evidence may be said to have shown that the appellants, who resided in Kentucky, had formed a partnership for the purpose of buying and slaughtering hogs in New Albany, Indiana, on the premises where the appellee was hurt, one of the appellants being the owner of the premises. At the time of the accident, they were engaged in preparations for commencing the business. The defendants were not personally present, and had no notice of the defective condition of the boiler. They had employed one Jones as a general superintendent of their proposed business, and in that capacity he was present, superintending the said preparations, and had engaged the appellee to come and go to work as a common laborer on the day when he was injured. He came accordingly, in the morning, and was preparing to go to work, but Jones had not yet arrived, when the explosion took place. Some days before, Jones had been notified by one who had been employed to clean the boiler and had been in it for that purpose, that the boiler was unsafe; that there was a crack in the head of it more than a foot long.

In support of their claim that Jones and the appellee were fellow-servants, and that the appellee can have no recourse upon the master

for an injury caused by the negligence of Jones to notify the master of the defective condition of the boiler, the following cases are cited. *Columbus, etc., R'y Co. v. Arnold*, 31 Ind. 174; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Hayden v. Smithville Manufg Co.*, 29 Conn. 548; *Roberts v. Smith*, 2 H. & N. 213; *Wigmore v. Jay*, 5 Exch. 354; *Keegan v. Western R. R. Co.*, 8 N. Y. 175; *Ormond v. Holland, Ell., B. & E.* 102.

The case does not, as we conceive, come within the principle contended for, as applicable to fellow-servants engaged in the same employment, but rather within the rule that a general agent employed to represent the master in his absence, and charged with the duties which it would be incumbent on the master to perform if he were present, is not a mere fellow-servant, whose negligence can impose no liability upon the master to an injured subordinate. The owner of mills or machinery, which men are employed to operate, owes duties to the employees which he cannot escape by absenting himself and committing the entire charge to an agent. This view is fully supported by the case of *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369, where it is shown that the individual who does act by an agent, as well as a corporation which can act in no other way, is responsible for the neglect of the general agent so employed. To the same effect are *Gornly v. Vulcan Iron Works*, 61 Mo. 492; *Shanny v. Androscoggin Mills*, 66 Me. 420, *Cumberland, etc., R. Co. v. State*, 44 Md. 283; *Cumberland, etc., R. Co. v. State*, 45 id. 229; *Brabbits v. Chicago, etc., R'y Co.*, 38 Wis. 289; *Sherm. & Redf. on Neg.*, § 102; *Whart. on Neg.*, § 222. This is in harmony with the cases wherein it is held that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation. *Pittsburg, etc., R'y Co., v. Ruby*, 38 Ind. 294; *Ohio, etc., R'y Co. v. Collarn*, 73 id. 261; s. c., 38 Am. Rep. 134; *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573; *Murphy v. Smith*, 19 C. B. (N. S.) 361.

Indeed the true ground of liability, as shown in the pleadings and the evidence, is the failure of the defendants to furnish safe machinery. Their general agent or superintendent represented them in respect to this duty; his knowledge was their knowledge, and so they must, on plain principles, be held responsible for the result.

Under the circumstances shown in this case, we cannot say that

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the jury were not warranted in finding that Jones was the general agent of the defendants, charged with the duty of representing them in all respects material to be here considered, and that his negligence was imputable to them. As against two of the appellants the proof is slight ; but yet enough to have warranted the submission of it to the jury, and therefore enough to support their verdict against interference by this court on appeal.

The judgment is affirmed, with costs.

Judgment accordingly.

Howk, J., did not participate in the consideration of this case.
Petition for a rehearing overruled.

MONTGOMERY V. STATE.

(30 Ind. 333.)

Criminal law — evidence — dying declarations as to abortion.

Dying declarations of the victim of an abortion are admissible on a prosecution for death thereby.

CONVICTION of abortion. The opinion states the case.

J. M. Vanfleet, for appellant.

D. P. Baldwin, attorney-general, *J. S. Drake*, prosecuting attorney, and *W. L. Stoner*, for State.

ELLIOTT, C. J. Appellant was tried and convicted upon a count in an indictment charging him with a violation of section 1923 of the R. S. of 1881. That section reads thus : “ Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure the miscarriage of such woman; or with like intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life — shall, if the woman miscarries or dies in consequence thereof, be fined not more than five hundred dollars nor less than fifty dollars, and be imprisoned in the State prison not more than fourteen years nor less

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than three years." It is charged in the indictment and there is evidence tending to prove, that the woman upon whom the wrongful act is alleged to have been committed died from its effect.

Over the appellant's objection, the State was permitted to give in evidence the dying declarations of the woman. This ruling presents the controlling question in the case.

It is contended on the part of the prosecution that the death of the woman is the gravamen of the offense, and that where death results from an unlawful act in producing abortion, the crime is homicide. In support of the principal contention, it is argued that the legislature had authority to specifically define and prescribe punishment for an unlawful act resulting in death, and that when this authority is exercised the prosecution should be under the statute specifically defining the crime. The case of *State v. Barker*, 28 Ohio St. 583, strongly supports this last proposition. In that case the court said : " Had this cause proceeded to trial upon the indictment for manslaughter, and had the evidence shown that the death of the woman was occasioned by administering drugs, or using instruments to produce an abortion, there could have been no conviction for manslaughter, because the evidence showed that another crime had been committed, for which there was a separate and specific punishment. The unlawful killing was done, it is true, while the slayer was in the commission of an unlawful act, but that unlawful act, when producing death, is a distinct offense, and must be punished as such." The reasoning of the court in *Smith v. State*, 28 Ind. 321, is strongly in the same direction, where it was said : " Prior to the passage of the act alluded to, there is no question that the evidence would have made a case of larceny. The act is very loosely and carelessly framed. The language of the first section would perhaps make every felonious taking by a hired servant of the goods of his master embezzlement, no matter whether the servant had the custody of the goods or not ; and as the punishment prescribed is not the same as for larceny, there is a great force in the proposition that larceny could no longer be maintained in such cases." It is true of the present statute, that a homicide committed in the prosecution of an unlawful act is punished differently from that resulting from the use of an instrument or the administration of drugs for the purpose of producing an abortion. Proceeding still further in this general direction is the case of *Jones v. State*, 59 Ind. 229, where it is held that where

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the evidence shows an offense to have been embezzlement, there can be no conviction of larceny. It is important to keep in mind that in Indiana there are no other crimes than such as are defined by statute. As all crimes are statutory, all prosecutions should be under the statute by which the offense is defined and the punishment prescribed. We agree with the State, that the appellant was rightly prosecuted under section 1923, although death resulted and although the act which caused it was an unlawful one.

It has long been settled that dying declarations are admissible only in cases of homicide. Starkie says of the rule admitting dying declarations. "But so jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and only renders such declarations admissible when they relate to the cause of death, and are tendered on a criminal charge respecting it." Starkie Ev. 32. The generally accepted doctrine is that stated in *Rex v. Mead*, 2 B. & C. 605, where it was said that they are only admissible "where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." Whart. Crim. Ev., § 288; Roscoe Crim. Ev. 32; 1 Greenl. Ev., § 156. This court has adopted and enforced this principle. *Binns v. State*, 46 Ind. 311; *Duling v. Johnson*, 32 id. 155; *Morgan v. State*, 31 id. 193. It has been often decided that in prosecutions for producing an abortion, dying declarations are not admissible. *Rex v. Lloyd*, 4 C. & P. 233; *Wilson v. Boerem*, 15 Johns. 286; *Regina v. Hind*, 8 Cox C. C. 300; *Wooten v. Wilkins*, 39 Ga. 223. If the prosecution were for producing an abortion, and death were not an essential ingredient of the crime, our way would be plain. We should be compelled to declare that the evidence was incompetent.

There are peculiar features distinguishing the case from one where the only charge is that an abortion was produced by the accused. The statute makes death an element of the offense, and death is therefore the subject of judicial investigation. The death was the result of an unlawful act, for to produce the abortion was expressly forbidden by law. If there were no special statutory provision upon this subject, the crime of which the appellant is accused would have been a felonious homicide. Blackstone says: "So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman; this is murder in the person who gave it." 4 Bl. Com. 201. Lord HALE

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lays down the same doctrine. 1 Hale P. C. 430. In a work of great authority it is said : " Hither also may be referred the case of one who gave medicine to a woman ; and that of another who put skewers in her womb, with a view in each case to procure an abortion whereby the women were killed. Such acts are clearly murder." The same doctrine is declared by Bishop. 1 Bish. Crim. L. 328. In the case of *State v. Moore*, 25 Iowa, 128, the authorities are reviewed, and it was held that where death resulted from an abortion, the person using the means by which it was produced was guilty of murder in the second degree.

It is clear that if there were no statute expressly defining the offense of which the appellant was convicted, he might upon the theory that the evidence established the acts charged against him, have been convicted of manslaughter. The elements of our statutory definition of that grade of felonious homicide are present, the commission of an unlawful act, and death resulting from it. But as we have seen, the State was bound to prosecute under the statute specifically defining the offense.

Is the offense any the less homicide because of the prosecution being under one statute rather than another ? Is the manner of the death any the less the subject of investigation than it would have been if the indictment had charged manslaughter or murder ? The case is entirely unlike a prosecution solely for producing an abortion ; there death is not a material element of the offense ; here it is. In the class of cases referred to death is no part of the body of the crime. In the case in hand the statute expressly makes it an essential ingredient, and the manner of the death is an important and controlling inquiry. All the statutory elements of an offense must be charged, and they must be proved as charged. *State v. Wright*, 52 Ind. 307. As the indictment charged that death resulted from the wrongful act, and as death is a statutory element of the charge, it became the direct subject of investigation.

If the statute had in express terms declared that the offense should be deemed murder or manslaughter, the evidence would have been competent. Can it make any difference that the statute either gives the offense no name or names it something else than murder or manslaughter ? Courts are to look to the substance of the offense defined ; they are not to be guided by mere names. If in reality the offense is homicide and the subject of inquiry the manner of the deceased's death, the settled rules of evidence which

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prevail in such cases should be enforced. Wisconsin has a statute very similar to ours. The principal difference between the two statutes is that the former declares that the person producing the abortion which results in death shall be deemed guilty of manslaughter. It was held in *State v. Dickinson*, 41 Wis. 299, that in a prosecution under the statute referred to, dying declarations were admissible. It was there said, in concluding a review of the authorities, that "These authorities show that the offense described in section 11, where the death of the mother ensued from the unlawful act, was murder at common law; and that the statute really reduced the grade of the offense to manslaughter in the second degree. And it is entirely clear that the dying declarations would have been competent evidence at common law, where the death of the deceased was as in this case, the subject of the charge and judicial inquiry, and the declarations relate to the circumstances of the death. Upon that point it seems to us there is no room for doubt. The fact that the offense with which the defendant is charged has been mitigated does not change the rule of evidence." The statute of Ohio is somewhat like ours, and it was held in *State v. Harper*, 35 Ohio St. 78; s. c., 35 Am. Rep. 596, that the dying declarations of the deceased were not competent. The ruling is placed upon two cases, *Regina v. Hind*, 8 Cox C. C. 300, and *People v. Davis*, 50 N. Y. 95. The first of these cases was a prosecution solely for feloniously using instruments upon a woman with intent to produce an abortion, and in which death was not an element of the offense. It is obvious that the case in hand is very different from that cited. In the case of *People v. Davis*, the court held that the dying declarations were not admissible in a prosecution under a statute very like ours. The reasoning of the court upon this point does not command our assent. We quote from the opinion: "Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. 1 Greenl. Ev., § 156, and cases cited in note; *Wilson v. Boerem*, 15 Johns. 286. This is the settled rule, and it is unnecessary to discuss the reasons upon which it is founded. Applying the rule to this case the declarations were not admissible. The charge against the prisoner was not homicide in any degree. The crime charged against him is that of persuading the deceased to submit to the use of an instrument upon her person, and to take

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drugs with intent to produce her miscarriage — in consequence of which the death of the child, and her own, were produced. The death of the deceased was not a necessary ingredient of the crime; that of the child was sufficient to make the offense a felony. The act alleged to have been perpetrated by the prisoner was a crime under the third section of the statute, in the absence of the death of the mother or child.” It seems to us that this entire reasoning rests upon an undue assumption. The statute expressly makes the death of the woman an essential ingredient of the offense. If there were no statute upon the subject, the crime would unquestionably have been murder, and we cannot perceive that it loses its character because the statute classifies the offense differently and prescribes a milder punishment. We think that the unlawful act possesses all the distinctive and essential features of felonious homicide, and that to declare that it is not homicide is to sacrifice the substance to the shadow. Whether the statute characterizes the act as felonious killing or not, is immaterial, if it plainly appears that it is such. If the result of the unlawful act is the subject of inquiry, then surely in such a case the manner of death must be.

The offense charged in this count of the indictment could not have been made out without evidence of the death of the woman. It may be true that some other charge could have been sustained without such evidence, but the question is not affected by that consideration. If then it was necessary to prove death, that subject was a material and controlling inquiry. The death of the woman from the unlawful act of the accused gives to the offense the character of a felonious homicide, and we think this character is not changed by the fact that the specific offense is described in a separate section of the criminal code and a milder penalty affixed. The characteristic elements of the crime of murder are present, and the reason for applying the rule is quite as plain as in any imaginable case of homicide.

We conclude, where death results from the unlawful attempt to produce an abortion, that death is the subject of inquiry, and that dying declarations are competent. If we adopt any other view we shall sacrifice principle to a mere form of words, and give an effect to a statute intended to secure punishment by an explicit definition of an offense, exactly the reverse of what its framers intended. We regard the statute as clearly intending that death shall be deemed a controlling element of the offense, and in this respect it

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differs from the statutes of New York and Ohio, as construed by the courts of those States. Under the section of the statute here receiving examination, there is no offense at all unless an abortion is actually produced, or the death of the woman ensues. One or the other of these results must follow the unlawful act. The indictment charges that death resulted. There is no charge that a miscarriage was produced. The material questions therefore were, did the accused commit an unlawful act, and did that unlawful act cause the woman's death? Nothing can be clearer than that if the State had not proved the death, no conviction could have been had. Death was therefore the subject of the charge and of the investigation. It was the subject of the charge in such a material manner as that no conviction could have been had without proof being made of the death. Proving the unlawful act and proving its result in reality proved a felonious homicide. If the crime is in fact homicide, then the case is within the rule; certainly bodily within the principle upon which the rule rests.

[Omitting minor matters.]

Judgment reversed.

STATE EX REL. ROUNDTREE V. BOARD OF COMMISSIONERS.

(80 Ind. 478.)

Municipal corporation — county's duty to replace bridges — adoption of private bridge.

A county, bound by statute to repair public bridges, is bound to replace or rebuild them when substantially destroyed.

A county adopting a private bridge becomes bound to keep it in repair.

MANDAMUS. The opinion states the case. The defendant had judgment below.

R. M. J. Miller, for appellant.

C. A. Buskirk, for appellee.

ELLIOTT, C. J. It was held in *State ex rel. v. Demaree*, 80 Ind. 519, that the statute imposes upon the county commissioners the

duty of keeping public bridges in repair, and that mandamus will lie to compel the performance of that duty. This decision disposes of one of the principal questions in the case before us.

There are two questions presented in the case at bar which were not directly presented in the former. They are:

1. Does the duty to repair extend to replacing or rebuilding, where there is a substantial destruction of the original bridge?

2. Is the county bound to repair in cases where the bridge is originally constructed by private individuals, but is afterward connected with highways constructed by the county, and is used and recognized by the citizens and officers as a part of the public way?

Of these in their order.

First. The duty to repair includes the rebuilding of bridges where they are essential to the existence and use of the highway. It is true that the commissioners have authority in certain cases to vacate highways, but this authority must be exercised in the manner prescribed by law. The vacation of a highway can not be brought about by the refusal of the commissioners to perform their duty respecting it. They are charged with the duty of keeping the highways reasonably safe and convenient for use for the purposes for which they were laid out, and they can not by a failure to do their duty deprive the citizens of the State of their right to use and enjoy the way common and free to all. As long as the highway exists, the officers in whose control it is must do their duty in keeping it in a reasonable and suitable condition for travel. The case in hand strongly illustrates the soundness of the principle, that it is the duty of the commissioners to rebuild a bridge which forms an essential part of a much travelled highway. If the bridge is not rebuilt, a public way is cut in two and rendered useless for all practical purposes. Citizens are deprived of the use of a road which they are taxed to support, for without a bridge the highway is for the greater part of the year rendered impassable.

It is established law that a county is liable for injuries received because of negligence in not making bridges safe for travel, and citizens, who are compelled to bear the burden imposed by a judgment for damages ought in justice to be entitled to compel their officers and representatives to perform their duty and make highways passable and safe. Unless the performance of this public duty can be coerced, it leaves the tax-payer too much at the mercy of negligent officers. If it is a duty, there ought to be a power

somewhere to compel its performance. Better compel the commissioners to expend public money in making highways passable and safe, rather than suffer it to be frittered away in the payment of damages.

It is very clear that if there is a decay of the timbers of a bridge, rendering it impassable, the county may be compelled to repair. Upon this point the authorities are agreed. It is difficult, if not impossible, to perceive why the same principle should not apply where a bridge has been destroyed by fire or swept away by a flood. The reason upon which the rule requiring repairs to be made rests is the same whether there be a total or a partial destruction of the bridge, for the reason of the rule is, that the officers owe the public a duty to keep highways in a proper condition for travel, whether the bridge is rendered entirely unfit for use by the decay or breaking of the materials of which it is constructed, or carried away by a flood; the result to the public is the same in either case. There is no solid ground upon which to rest a distinction between the case of a bridge becoming entirely unfit for use by the giving way of some of its parts, and that of a bridge being carried off by a flood. Replacing by repairs a structure destroyed by decay is in reality the substitution of a new for the old, and replacing a bridge destroyed by fire or water is nothing more.

In *Briggs v. Guilford*, 8 Vt. 264, it was assumed without debate, by court and counsel, that the duty to repair embraced the obligation to rebuild a bridge which had been carried away by a freshet. It was held in *People v. City of Brooklyn*, 21 Barb. 484, that a statute providing for repairs of a street embraced the act of substituting new curbstones for old ones. The definition of Walker that repair means "reparation, supply of loss, restoration after dilapidation," is approved. The case of *People v. Hillsdale, etc., Co.*, 23 Wend. 254, decides that a statute requiring a turnpike company to make repairs imposed upon it the duty of rebuilding a bridge which had been destroyed by an inevitable accident. In the case decided by Lord KENYON, *Brecknock, etc., Co. v. Pritchard*, 6 T. R. 750, it was held that a covenant in a contract, binding a party to keep a bridge in repair, imposed upon him an obligation to replace it, although it was totally destroyed by a flood. More directly in point than any of the cases cited is that of *Howe v. Commissioners, etc.*, 47 Penn. St. 361. The court there said: "If we should construe the word 'repair' in this act as strictly as the court

below did, nay, if we should set aside the act altogether, the duty of maintaining the bridge, once legally imposed upon the county, and never taken off, would still have to be enforced. But we can not so read the act as to exclude the restoration of a broken superstructure. What but a 'repair' of the bridge is the renewal of the superstructure?" At another place in the same opinion it is said: "We can not graduate repairs, and say slight ones shall be done and large ones may be neglected. The legislature did not mean we should do this. They meant by repairs whatever was necessary to make bridges safe and passable."

In giving to the word repairs the meaning of restoring or rebuilding, no new legal signification is annexed. From the earliest times of the common law to the present the word has been deemed to embrace rebuilding. This is proved by the long line of cases declaring that where a tenant covenants to repair he is bound to rebuild, even though the demised premises are totally destroyed. Nor in doing this is any violence done to language. The lexicographers give as a synonym of repair, "to restore," and surely to put a new bridge in the place of one destroyed is in effect nothing more than a restoration.

We come now to the second question. In a very old case referred to by counsel in *Rex v. West Riding*, 5 Burr. 2594, it was said, "that if a private person build a bridge which afterward becomes a public convenience, the county is bound to repair it." In the case in which this citation was made in argument it was held, that although the bridge was not erected by the Riding, yet if it was a public convenience, and adopted and used by the Riding, it was bound to repair. The reporter says: "The court were all clear, that the Riding was obliged to repair the new bridge." Justice WILLES said: "The county have had the advantage of it" (the bridge) "above twenty years and they ought to repair it." Justice BLACKSTONE, concurring, remarked: "Here the benefit and utility were to the public; it was constantly used by every one who went that road." The report also states: "Lord MANSFIELD (who came into court during the discussion of this case), declared himself likewise to be clearly of the same opinion. The Riding ought to repair it, undoubtedly." In *Rex v. Yorkshire W. R.*, 2 East, 342, Lord ELLENBOROUGH, having made a quotation from Lord COKE, proceeds as follows: "Again he says, 'if a man make a bridge for the common good of all the subjects, he is not bound to repair it ;

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for no particular man is bound to reparation of bridges by the common law but *ratione tenuræ* or *prescriptionis*.' Now that this bridge is for the common good is proved by the use of it by all the king's subjects passing that way, by its not having been treated as a nuisance, but acquiesced in. Then after having enjoyed the benefit of it, shall the public object to it when they begin to feel the burden of repair? The doctrine laid down by Lord COKE has been since recognized in the cases referred to, and in other books; particularly it was much considered in the case of Glusburne bridge; upon the authority of which other cases have been since ruled. * * The rule laid down by Mr. Justice ASTON, in the Glusburne bridge case seems to be the true one; 'that if a man builds a bridge, and it becomes useful to the county in general, the county shall repair it.' He says nothing about the adoption of it by the public; and there is good sense in not relying on that, except as evidence of its being a public bridge, and of utility to the public." It will be observed that the case from which we have quoted goes much further than we are required to go, for in the case in hand there was an adoption by the public. The doctrine declared by Lord ELLENBOROUGH is fully sustained by the English cases. *Regina v. Wilts*, 3 Salk. 381; *Regina v. Bucclough*, 6 Mod. 150; *Rex v. Lancashire*, 2 B. & Ad. 813; *Rex v. Kent*, 2 M. & S. 513. The common law upon this subject is settled, and as that law is in force in Indiana, it governs this case, unless there is some statutory enactment changing the rule. We have not been able to discover any statute changing the rule, and we must hold it to be in force and applicable to this case. There are many American cases declaring and enforcing the rule of the common law. In *State ex rel. v. Supervisors*, 41 Wis. 28, it is held that if a county purchases a bridge built by a private corporation, it is bound to keep it in repair, and that mandamus will lie to compel the performance of this duty. We suppose it can make no difference whether the acquisition is by purchase or by adoption. The principle is the same in both cases. More directly in point is the case of *Town of Dayton v. Town of Rutland*, 84 Ill. 279; s. o., 25 Am. Rep. 457. In that case it was held that the acceptance of a bridge built by private individuals might be inferred from building a road to connect with it and levying a tax for repairs, and that the towns accepting it were bound to keep it in repair. There are well considered cases, holding that where bridges are built by turnpike companies and

afterward abandoned, they revert to the public, and that if they are accepted and used as part of a public highway, the county must maintain them in proper repair. *State, ex rel. v. Lawrence, etc., Co.*, 22 Kans. 438; *Craig v. People*, 47 Ill. 487; *Central Bridge Co. v. City of Lowell*, 15 Gray, 106.

The general doctrine upon the subject is thus stated in *State v. Town of Campton*, 2 N. H. 513: "Though the use and repairs of it" (the bridge) "may have been under a protest against their liability, and for a shorter period than twenty years, the liability is still fixed, if the bridge be not indicted as a nuisance, and be used by the public so long and so much as to evince its usefulness to them." Another court thus states the doctrine: "The purport of a number of authorities appears to be, that any person may erect a bridge over a stream crossing a public highway, if it be of public utility. If it be built in a slight and incommodious manner, it may be treated as a nuisance. If not so treated as a nuisance, and it be really for the use and benefit of the public, then the charge of its repair is thrown on the county." *Bisher v. Richards*, 9 Ohio St. 495. In *Requa v. City of Rochester*, 45 N. Y. 129; s. c., 6 Am. Rep. 52, the court used this language. "So the bridge, whether originally placed there by the corporate authority or by one volunteering to do that which that authority ought to have done, became the property of the city. In the first instance, plainly enough. In the second instance by acquiescence in its being laid there, by adopting it, by receiving it as a gift, in kind as it would take and accept a street by dedication of the owner of the land. And in the one case as in the other, being bound, after acceptance to keep it in condition for safe passage over it." Of the many cases illustrating the general rule under consideration, we cite the following. *Houje v. Town of Fulton*, 34 Wis. 608; s. c., 17 Am. Rep. 463; *Batty v. Duxbury*, 24 Vt. 155; *Dygert v. Schenck*, 23 Wend. 446 (35 Am. Dec. 575); *Mayor v. Sheffield*, 4 Wall. 189. The principle laid down in the cases to which we have referred is substantially the same as that declared in *City of Indianapolis v. Lawyer*, 38 Ind. 348, where it was held that a city, which makes use of a culvert constructed by a railroad company, thereby adopts it, and is responsible for neglect to keep it in proper repair.

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The second question stated must be answered in the affirmative. A county may by adoption make public a bridge constructed by private individuals, and when it is thus made public, becomes bound to keep it in repair.

The court below erred in sustaining the demurrer to appellant's complaint, and the judgment must be reversed.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

CANFIELD V. ANDREWS

(54 Vt. 1.)

Water-courses — rights of riparian owners on — injunction.

The upper of two neighboring mill-owners on the same stream may divert the water on his own land by an artificial channel, provided he restores it to the natural channel, with reasonable care and prudence and without appreciable injury to the lower owner; and may store or pond the water so long as is reasonably necessary; but may not discharge saw-dust and refuse into the stream except as is indispensable to his beneficial use of the water;* and may be restrained by injunction.

BILL for injunction. The opinion states the case. The defendant had judgment below.

J. K. Batchelder and Burton & Munson, for orators.

* See *Goodyear v. Schaeffer* (57 Md. 1), 40 Am. Rep. 419

Canfield v. Andrewa.

T. Sibley, for defendants.

ROYCE, C. J. The bill in this case alleged that the orators then were and for a long time previous had been the owners and possessors of a mill and the necessary machinery for operating the same, situate on a small stream flowing into the Battenkill river, in the town of Arlington; that they were the owners of the land through which said stream runs between said mill and the Battenkill river; that said stream was constituted of two small streams, the sources of which were some distance above the lands of the orators, and which united their waters upon the land of the orators, thus making the stream upon which the orators' mill was situate; that the defendants were the owners of a mill erected and used for the purpose of manufacturing lumber and clothes pins, situate on the same stream, some distance above the orators' mill; that they then were and for a long time before had been engaged in the manufacture of lumber and clothes pins in said mill, and in such manufacture had made large quantities of saw-dust, shavings and refuse, and had discharged and thrown the same into said stream and they had been carried by the current of the stream into the orators' mill-pond where they had settled and remained and had nearly filled it up, whereby the orators had been compelled to stop their mill, draw off the water in their pond and at great expense and trouble remove said sawdust, shavings and refuse; that some portion of said sawdust, shavings and refuse had been carried past the orators' mill and lodged and deposited on their meadow land between their mill and the Battenkill river; that the defendants had diverted the water of one of the aforesaid streams which helped to make the stream upon which the orators' mill is situate from its natural channel, in which it had flowed from time immemorial, whereby the orators were deprived of its use; that the defendants were in the habit of storing up or ponding the water in said stream and then discharging the same in an unreasonable manner, and so as to deprive the orators of the beneficial use of the same. These are the allegations substantially, upon which the orators predicate their claim to relief in this court.

The answer admits the title under which the property of the parties is held as alleged in the bill; that the use of the two mills has been to a certain extent as alleged; that some portion of the sawdust, shavings and refuse made at the defendants' mill has been

discharged or deposited in said stream, averring that it was necessary to the operation of their mill and the carrying on of their business that it should be so discharged or deposited, and that in so doing they were in the exercise of a legal right; and denying that the orators had been injured thereby in the use and enjoyment of their mill, or their land injured by the lodging or depositing thereon of any sawdust, shavings or refuse made at the defendants' mill. It admits the diversion of the stream and justifies the same; admits the storing or ponding of the water to a certain extent, and justifies the same.

Upon the issues of fact thus made a large amount of testimony has been taken — much more than seems to have been necessary under the pleadings. The orators pray that an account may be taken of the damages that they have sustained, and that the defendants be decreed to pay the same, and for an injunction.

No question is made in the answer as to the jurisdiction of the Court of Chancery; and inasmuch as no objection was made to the jurisdiction of that court by answer, plea or motion, the court might properly treat it as having been waived. But inasmuch as the defendants' solicitor in argument insists that the orators have not made out a case that entitles them to any equitable relief, we have considered the jurisdictional question.

The relief that is granted by a court of equity is either remedial or preventive; it either grants positive and affirmative relief, or restrains the doing of acts that are against equity and good conscience. In giving remedial relief it usually proceeds by decree; and administers preventive relief by injunction. The orators in this case pray for preventive as well as affirmative relief. The allegations in the bill give the Court of Chancery *prima facie* jurisdiction over the subject-matter and the parties. When the act complained of is of such a character that courts of law cannot give an adequate compensation for the injury resulting therefrom, or if continued, would ripen into a right, or lead to a multiplicity of suits, a court of equity may by injunction restrain the continuance of the act. In *Blakemore v. Glamorganshire Canal Navigation Co.*, 1 Mylne & Keen, 154, 185, it is said by Lord BROUGHAM, in speaking of this remedy, and in a case quite analogous to this in its facts that such a restraint should be imposed as may suffice to stop the mischief complained of; and when it is to stay injury, to keep things as they are for the present. Past injuries are in themselves

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no ground for an injunction; the province of the injunction being to prevent future mischief. Numerous cases are referred to in the 10th chapter of Angell on Water-courses, and Bennett's edition of Goddard's Law of Easements, where this remedy has been applied to prevent the obstruction or pollution of water-courses.

The court then having jurisdiction, it must be determined from the pleadings and proofs whether the allegations in the bill are so far proven as to entitle the orators to equitable relief. And first, as to the diversion of the stream complained of. It is found that the defendants diverted the water of that stream from its natural channel by means of an artificial channel made by them, for the purpose of using the water in propelling the machinery of their mill; and after it had been so used by them, it was conducted back into its natural channel at a point a short distance above the premises of the orators; that in so doing they acted with reasonable care and prudence; that the natural flow of the water in the stream at its point of connection with the other stream below the defendants' mill was not materially lessened by the use so made of it by them; and that the orators have not sustained any appreciable injury by reason of such diversion and use. The orators had no riparian rights in the stream where it was diverted; because they were not the owners of the land through which it runs; and while it is true that the owner of land, through which a stream flows, has no right to divert its course to the prejudice of those below him, they have no cause for complaint if they are not in any way injured by such diversion. So the defendants were in the exercise of their legal rights in the diversion of said stream and the use of the water.

The allegation that the defendants stored or ponded the water, and discharged the same in such quantities, and at such times as to do a legal injury to the orators, is not sustained by the proofs. The defendants had the right to the use of the water and to detain it as long as was necessary to the proper enjoyment of that right. In the detention of the water they did not exceed that right, and when they had so used it, it was discharged in a reasonable and proper manner. See Ang. on Water-courses, § 119, and cases cited.

The complaint, that the orators' lands below their mill were injured by the depositing thereon of the waste from the defendants' mill, is not so sustained as to entitle them to any relief in this court. We do not doubt that some of the waste from the defendants' mill

was lodged upon the orators' lands. The waste from their mill and the orators' mill, and what came from the Battenkill river, were all commingled together, and caused the damage complained of. The aggregate injury occasioned to the orators by all the waste thus deposited is so inconsiderable in amount that we do not feel justified in attempting to ascertain what proportion of it was occasioned by the acts of the defendants.

The remaining and more important question arises under the allegation of the practice of the defendants in discharging their waste into the stream and thereby injuring the orators in the use and enjoyment of their mill. The fact that the defendants had been in the habit of either discharging the waste from their mill directly into the stream or leaving it on the banks in such position that it found its way into the stream in such quantities that it filled up the orators' pond to the extent that they were put to considerable necessary expense in removing it, and that it seriously interfered with the profitable use of their mill is established by the proofs. It is equally as well established that there was no necessity for the defendants to dispose of their waste in that manner. It was a matter of convenience for them to so dispose of it; they could have gotten rid of it in some other way, but that would have entailed upon them additional expense.

Upon these findings the equitable rights of the parties are to be determined. Shall the defendants be permitted to dispose of their waste as they have hitherto done, notwithstanding the injury it may occasion to the orators? or shall they be enjoined?

The maxim, *sic utere tuo ut alienum non laedas*, — which has always been understood to mean that one must so use his own property as not to injure that of another — is one of general application both at law and in equity. The practical enforcement of the principle therein contained has been suspended only in exceptional cases, and when owing to peculiar circumstances, it has been deemed unjust and inequitable to apply it — as when questions of public interest, benefit or convenience, were involved, and it has appeared that the damage to the property owner or owners would be more than compensated by the benefit to them and to the public, arising from a continuance of the act producing the injury; or where there has appeared to be a public necessity that could only be met by the continuance of such act.

The cases of *Snow v. Parsons*, 28 Vt. 459, and *Jacobs v. Allard*,

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42 id. 303 ; s. c., 1 Am. Rep. 331, are relied on as authority for the proposition that this case is to be regarded as coming within the exception to the above maxim. In *Snow v. Parsons*, the court, in speaking of the right to the use of water, say that the reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietor below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use. The court further say that there is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below ; and that testimony showing the uniform custom of the country was admissible upon the question of the reasonableness of the use made. In *Jacobs v. Allard* the facts were different ; but the same question was before the court, and they say that “the true idea of the law involved and governing the subject of this cause is well stated and developed in *Snow v. Parsons* ;” and although Judge BARRETT, in what is subsequently said in the opinion, uses language that taken alone might be construed as giving an unlimited right to the manufacturer to discharge his waste into the stream upon which his works are situated, we think that language must have been used with reference to the facts as they appeared in the particular case then under consideration, rather than with the intention of promulgating a general rule upon the subject. The qualification stated by the learned judge in the subsequent portion of the opinion confirms us in this belief.

While it is true that a manufacturer has the right to appropriate and use the water of a stream in a proper manner, it is equally true that he must respect and regard the rights of riparian proprietors below him ; and while such owners must submit to such inconvenience and injury as may result from such use, they are not compelled to submit to damages which are not necessarily occasioned thereby. Such damages as are incident to, and necessarily result from, a proper use of the water must be borne ; but the manufacturer has no right to do any act that in its consequences is injurious to others because it is a matter of convenience or economy for him to do it. It is as much the duty of a manufacturer to so dispose of his waste as not to injure others, as it is to refrain from injuring others by any other act. No one is allowed to deposit any substance in a running stream that will pollute its

waters to the injury of a riparian proprietor below. *Wood v. Sutcliffe*, 8 L. & Eq. 217; Goddard's Law of Easements (Bennett's edition), 67 and 253. Neither has any one the right to deposit any other substance in such a stream, beyond what is absolutely necessary to a beneficial use of it, to the injury of mill-owners or the lands through which the stream may run. It would be manifestly unjust to hold that a manufacturer could so conduct his business as to seriously impair the value of the rights and property of other manufacturers on the same stream below, and injure or perhaps ruin lands of riparian owners without accountability, upon the showing that it was more convenient and economical to him thus to conduct it.

The acts of the defendants in depositing the waste made at their mill in the manner we have found it has been done, were illegal, and a perpetual injunction will be issued, enjoining them, their heirs, executors, administrators and assigns from so disposing of it in the future.

We do not understand in what is now decided, that we are overruling the decisions relied upon by the defendants in 28 and 42 Vermont; but applying the law, as there laid down, to the facts found in this case.

The *pro forma* decree of the Court of Chancery, dismissing the bill, is reversed and the cause remanded, with a mandate that an injunction be issued perpetually enjoining the defendants, their heirs, executors, administrators and assigns from depositing any sawdust, shavings or refuse in the stream described in the orators' bill, at any point above the orators' mill, except such as may be absolutely and indispensably necessary for the beneficial use of the water of said stream by the defendants; and that an account be taken of the damage that the orators have sustained on account of the lodging or depositing of sawdust, shavings and refuse made at the defendants' mill in their mill-pond, and in the operating of their mill and machinery in consequence thereof. And that upon the ascertainment of the amount of such damages, and after deducting therefrom the proportion thereof that shall be found to have been occasioned by the depositing in said stream of such sawdust, shavings and refuse by the defendants as was absolutely and indispensably necessary for the beneficial use of the water of said stream at that time, a decree be entered for the orators for the amount of the damages that may be so ascertained. And that the

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costs in the Court of Chancery and in this court be apportioned and settled by the Court of Chancery.

So ordered.

ROBINSON v. FROST.

(54 Vt. 105.)

Marriage — insane husband — guardianship of.

The natural guardianship of an insane husband, of full age but without a legal guardian, is in the wife rather than in his father ; and the wife may enter the father's dwelling, where the husband and wife had an exclusive temporary apartment, and remove her husband, in spite of the father's opposition.

TRESPASS *quare clausum*. The opinion states the case. The defendant had judgment below.

Davenport & Eddy, for plaintiff.

K. Haskins and C. B. & C. F. Eddy, for defendants.

Taft, J. This was an action of trespass *quare clausum* for breaking and entering the plaintiff's dwelling-house. The plaintiff is a householder in the town of Newfane. He had a son, William H., forty-eight years of age, who, with his wife and children, was domiciled in the State of Illinois. This son was in poor health, afflicted with disease of the brain, which greatly impaired his mind ; and in the year 1879, he came or was brought into this State, to his father's house, his wife accompanying, as the evidence tended to show, having charge of him. He and his wife remained at his father's house until February, 1880, when she desired to return with him to their home in Illinois. This was opposed by the father. The defendants, as agents and servants of the wife, entered the plaintiff's dwelling and removed the said William, and it was for this entry and resisting the plaintiff in his attempt to prevent taking said William away, that this action was brought.

The plaintiff having given his son leave to enter his house, could not prevent his departure, unless by law he had some authority over

him which would justify detaining him. Upon the trial below no question was made as to the insanity of the son ; and the question was presented, and the case depends upon it, whether the father, or the wife, was entitled to his custody, and the control of him. The County Court instructed the jury that the wife had the right to say whether he should be taken away or left there, the same right that William himself would have had, had he been of sound mind. We think the instructions in this respect correct. We do not think that the father's rights as natural guardian, which ceased when the son arrived at full age, were restored, or became endowed with new life, upon the insanity of the son. His rights as one in charge of an insane person, and his liability in respect thereto, were the same and no greater than though such insane person had been an entire stranger to him. There was no statutory guardian ; probably none could have been appointed, as William was but temporarily in the State. It is unnecessary, however, to determine that question, as it does not arise. In the absence of such guardian, whether the father or wife should control the insane son and husband, we have no hesitation in saying that the right should be in the wife, for during the insanity of the husband she should be regarded as the head of the family, and entitled to the control of it ; and that no one, as against the right of the wife, should have the power to control the abiding place of the husband ; such power naturally including the right to alter the domicile, which is sometimes accompanied with a radical change in the descent of personal estate, and in those principles that are most intimately connected with the domestic peace and rights of the family.

Independent of this question of the right of the wife to control her insane husband, we think she was entitled to the care and custody of him. He was insane ; was brought into the State in her control ; and as the one actually having charge of him, whether her husband or not, she should be held responsible for his restraint, and therefore entitled to his custody.

Judgment affirmed.

POWERS, J., absent.

Shaw v. Carpenter.

SHAW V. CARPENTER.

(54 Vt. 155.)

Mortgage — partly illegal — enforcement.

A mortgage on land, executed in part for an illegal consideration, the amount of that part being certainly ascertainable, may be enforced for the legal portion.

FORECLOSURE. The opinion states the case. The orator had judgment below.

M. R. Tyler, for defendant.

William G. Shaw, for orator.

ROYCE, C. J. This cause was heard upon the report of a special master appointed to ascertain and report the amount due on the mortgage described in the petition.

It appears from the report that on the 24th day of July, 1873, one Benj. D. Peterson, who was then engaged in the business of bottling cider, soda, and mineral waters, at the city of Burlington, sold the good will of the business and all his stock, tools, bottles, machinery and fixtures, then in use by him in said business, as specified in certain inventories, which were signed by the said Peterson, to the defendant Carpenter.

Upon said inventories the various articles sold were separately carried out, with a separate price for each item. The footings of the separate pages were brought forward upon the last page, where the aggregate correctly appeared of the sum \$3,221.81. To this amount an item of \$116 was added, which was included in the note first due. It is not found what the consideration for that item was. The good will of the business was included in the sale, and was not estimated in the inventory. It is probable that it may have been estimated by the parties at that time. For the amount so ascertained the defendant Carpenter executed four promissory notes payable to said Peterson, or order, and secured the same by the mortgage sought to be foreclosed. Said notes have all been paid, but the last, which was for \$800; and that fell due on the 24th of July, 1876. The interest on that note was paid to the 24th of July, 1876.

On the 28th day of October, 1872, and before the maturity of any of said notes, Peterson sold them and the mortgage for an adequate consideration to the petitioner; the petitioner then believing the notes to be based on a valid and legal consideration, and not suspecting that any illegal element entered into the consideration.

Of the property sold by Peterson to Carpenter, and which formed a part of the consideration of said notes, the master has found there were the following goods, in kind and amount: Lager beer, \$23.94; Cider, \$422; Ale, \$209.38; Porter, \$6.72; Alcohol, \$2.25.

The defendant Carpenter claims that if any part of the consideration for the notes was illegal, they are void; that no recovery could be had upon them; and that a court of equity cannot grant any relief to the petitioner.

[Omitting a minor consideration.]

The sale of the ale, porter, and alcohol being illegal, the consideration for the notes, as far as the value of those articles went to make up the amount for which the notes were given, was an illegal consideration.

The important question in the case is, as to the effect that such partial illegality of consideration is to have upon the rights of the parties. *Robinson v. Bland, Administratrix of Sir John Bland*, 2 Burr. 1077, has always been regarded as a leading case; and opinions were given in it by Lord MANSFIELD and Justices DENISON and WILMOT. The declaration contained three counts; the first, upon a bill of exchange; the second, for money lent and advanced, and the third, for money had and received. A verdict was found for the plaintiff for £672, the amount of the bill of exchange. It was found that the consideration for the bill of exchange was £300, lent by the plaintiff to Sir John Bland at the time and place of play; and £372 were lost at the same time and place by Sir John Bland to the plaintiff at play. It was held that the £372, part of the consideration for the bill, being for money lost at play, could not be recovered, all such securities being void under the statute; and that a part of the consideration for the bill being illegal, no recovery could be had under the first count; that the plaintiff was entitled to the £300 lent, and was allowed to recover it, under the count for money lent and advanced. Judge DENISON says there is a distinction between the contract and security. If

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part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security. That being entire is bad for the whole. Judge WILMOT: "As to contracts being good and the security void—the contracts may certainly be good, though the security be void."

The same principle as to such a security being void was enunciated in *Scott v. Gilmore*, 3 Taunt. 226. See also *Fundt v. Roberts*, 5 S. & R. 139; *Phillips v. Cockayne*, 3 Campb. 119; *Edgell v. Stanford*, 6 Vt. 551. These two first cases have oftenest been quoted as authority for the rule that has generally prevailed in the English and American courts, that where a part of the consideration for a security is illegal the whole security is void.

The cases referred to by counsel for defendant were all cases where attempts were made to enforce such securities, and the cases of *Hinesburgh v. Sumner*, 9 Vt. 23, and *Woodruff v. Hinman*, 11 id. 592, were of the same kind. In none of these cases was the court called upon to decide what the effect of holding the security void would be upon the original contract, where that was bad, in part, upon a good and legal consideration.

In *Carlton v. Woods*, 28 N. H. 290, the question was presented. The declaration in that case contained counts upon several promissory notes, and a count for goods sold and delivered. The plaintiff agreed to sell the defendant a stock of goods and groceries at cost and freight. A schedule of the articles was made, and the cost of each. The sum total of the cost of all the articles was divided into several parts, and the notes declared upon were given for the same. Among the articles so sold were some spirituous liquors illegally sold, the price of which formed a part of the consideration for the notes. A verdict was taken for the plaintiff, for the cost of the goods remaining unpaid, except the spirituous liquors; and judgment was to be rendered on the verdict, or it was to be set aside, as the opinion of the court should be. It was held that the counts upon the notes were not maintainable; that the consideration of the several notes was in part illegal, and therefore no recovery could be had upon them; that the legal effect of the contract was that each article was to be valued separately, and that the sale and delivery of each article formed the consideration for the promise to pay for it; that the contract was divisible; and while the separate value of the articles sold could be ascertained, as fixed by the parties, the principle is not readily seen, which would

defeat the right of recovery for the stipulated price of that portion, the sale of which was legal ; and judgment was rendered on the verdict. The same was substantially held in *Walker v. Lovell*, in the same volume, 138. The law does not favor any party in evading payment, while he retains the consideration.

The notes which were given for the good will and property sold to Carpenter were all infected with illegality, and the defense of illegality attached to all of them ; so that if what is now claimed as a defense can be allowed, if proceedings had been instituted to compel payment before any thing had been paid, the entire claim could have been defeated, notwithstanding Carpenter had received, and was in the enjoyment of the property, upon the ground that the portion of the property above enumerated was illegally sold. It has somewhere been said, that the declaring such a security void was to be regarded as a punishment of the party for having made an illegal contract.

The loss of the property illegally sold would generally be considered a sufficient punishment, certainly when the sale was only *malum prohibitum*, and no wrongful intention appears. But a court of equity could never hold that one might be deprived of his entire fortune, because in the consideration agreed to be paid for it, there was intermingled some article the sale of which was prohibited.

We regard the case of *Carlton v. Woods, supra*, as sound law and well sustained by authority. Its application works out just and equitable results, and we shall apply the principles there enunciated in the decision of this case.

Peterson could have recovered against Carpenter in an action of assumpsit, for all that was sold to him, except the ale, porter, and alcohol. The mortgage would be treated as security for the debt due from Carpenter, on account of the property legally sold to him, Peterson might have foreclosed the mortgage, and thus have compelled payment of the debt.

The petitioner, by his purchase of the notes and mortgage, acquired all the rights, legal and equitable, of Peterson. He could maintain a suit at law for his own benefit, in the name of Peterson, or a petition in equity, as assignee of the mortgage, to foreclose it. And in the disposition of such a petition it is the duty of a court of equity, which has been said to be the great sanctuary of plain dealing and honesty, to compel the payment of that portion of the debt that was secured by it, that was legally and fairly contracted.

Ormsbee v. Howe.

The decree of the Court of Chancery is reversed and cause remanded, with mandate that a decree be entered for the petitioner for the amount due on the note for \$800 described in the petition, with interest after deducting therefrom the sums of \$209.38, \$6.72, and \$2.25, being for the ale, porter, and alcohol illegally sold — as of the date of the note. If the amount due cannot be ascertained from the computations made by the master, it is to be ascertained in such manner as the court may direct.

Judgment reversed.

Ross and TAFT, JJ., dissented.

ORMSBEE V. HOWE.

(54 Vt. 122.)

Negotiable instrument — bona fide holding.

A note obtained by duress and fraud, and without consideration, is void in the hands of a third person who is a general purchaser of the payee's notes, knowing his fraudulent practices in obtaining them.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

J. J. Wilson and J. K. Batchelder, for defendants.

Ormsbee & Briggs and Prout & Walker, for plaintiff.

VEAZEY, J. The plaintiff, an attorney, brought three suits in his own name in behalf of one Healey, who purchased the notes before due, of one Preston, the payee. Preston by fraud obtained orders of the defendants respectively for a lot of wire clothes line, and after filling the orders according to their terms, demanded through an agent payment of the defendants. They at first refused on account of the fraud, not knowing until the demand that they had signed such orders, and not in fact having signed them understandingly, and having been induced to sign them through fraud; but the orders being produced and suits threatened, they gave the notes in question. Where a claim is wholly without

foundation and known by the parties to be such, a promise to pay it is without consideration. There is in such a case nothing to be settled, therefore the settlement is no consideration for the promise. See authorities cited in defendant's brief.

This case discloses a scheme to get this wire clothes line on to people in a fraudulent way. It was first to get an order from a man by the use of all the fraud necessary for that purpose, and then by confronting him with the order and by threats of suit get a settlement. The scheme, as originally concocted, extended through to the obtaining of the note. The order being obtained by fraud, no debt was created. There was nothing to found a settlement or compromise upon. Preston had no right to fill the order by forwarding the goods, and his doing so did not change or affect the transaction. That was a part of the scheme. The scheme was to bring about a disposition of his goods in the form of a sale by the use of fraud. The iniquity of the conception is carried out in the execution without discovery by the other party until the demand for settlement. The fact that the defendant yields to the demand and threats, and promises to pay or gives a note with knowledge of the fraud, cannot help the promisee, because the note is but the fruit, the outgrowth of Preston's original fraudulent conception and act. His soiled hands have not thereby become clean. The compromise of a doubtful right is a sufficient consideration for a promise, and it does not matter on whose side the right ultimately turns out to be. But where the promise is extorted by threats to sue on a claim which the party knew was wholly unfounded and which he was making for the purpose of extorting money, the contract is utterly void. *McKinley v. Watkins*, 13 Ill. 140, and the other cases cited by defendants.

We think the case discloses that Healey understood Preston's methods; that he knew that Preston deliberately proposed to practice fraud if necessary to get rid of his wares through the forms of sale, and that he became a general purchaser of his notes, knowing his fraudulent purpose and the likelihood that such purpose would often have to be carried out in order to get the notes. He was not only put upon inquiry but we think upon the facts found that he bought the notes in bad faith. He was not an innocent purchaser under the rule as contended for by the plaintiff. Justice SWAYNE says in *Murray v. Lardner*, 2 Wall. 121: "The rule perhaps may be said to resolve itself into a question of honesty or dishonesty, for

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guilty knowledge and willful ignorance alike involve the result of bad faith." To buy notes generally that Healey knew would to some extent be likely to be infected with fraud, was not an honest act. He practically lent himself for a profit to Preston to enable him to carry out his fraudulent purpose.

The judgment of the County Court in both cases is reversed, and judgment is rendered for the defendants respectively to recover their costs.

Judgment reversed.

McGOWAN V PEOPLE'S MUTUAL FIRE INSURANCE COMPANY.

(54 Vt. 211.)

Insurance — void in part — severability.

If an insurance policy on real and personal property is conditioned to be void if the property shall be mortgaged, and the real estate is mortgaged, the policy is void unless the properties are insured for separate sums and the risk on the personalty is not affected by the mortgage.*

BILL in chancery. The opinion states the case. The orator had judgment below.

Roberts & Roberts, for defendant.

Redington & Butler and *J. B. Phelps*, for orator.

TAFT, J. The policy in question contained the following provision: "Whenever any one hereafter insured shall alienate conditionally by mortgage, his policy shall be void, unless he shall make a representation thereof in writing to the secretary, stating the amount, and to whom mortgaged, and the cash value of lands and buildings separately, and when approved by a director, the secretary shall enter a minute thereof on the record of said policy and forward to the insured a certificate thereof."

The assured mortgaged the real estate covered by the policy on the 24th day of July, 1878; the property was destroyed by fire on

* See *Aetna Ins. Co. v. Rees* (44 Mich. 55), 38 Am. Rep. 228, and note, 230.

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the 18th day of the following month; notice of the mortgage was given to the secretary on the 12th day of September afterward,—fifty days after its execution and twenty-five days after the fire. The orator contends that he was entitled to a reasonable time to represent the mortgage to the company. He delayed for twenty-five days and until the destruction of the property. He could have communicated with the secretary daily. There is much good sense in saying that upon the execution of the mortgage the policy was void, as though the contract had read “until he shall make a representation,” etc., instead of “unless he shall make,” etc. But construing the clause most favorably to the assured, and giving it the construction contended for, we think the delay of twenty-five days, when he could have communicated with the company daily, an unreasonable one. This disposes of this branch of the case, and renders it unnecessary to determine what the rights of the assured to have had the contract continued, would have been in case he had applied for that purpose within a reasonable time. The case of *Boynton v. Farmers' Ins. Co.*, 43 Vt. 256; s. c., 5 Am. Rep. 276, does not aid the orator. In that case, upon the alienation of the property, the policy was actually assigned and by its terms the assignee had thirty days to apply to the company for a ratification of the assignment; only eight of which had elapsed; and the company by its demurrer admitted that it had no cause for the refusal to ratify the assignment. That case might be invoked as an authority in this case, provided notice of the mortgage executed by the orator, had been given by him within a reasonable time and the defendant had without cause refused to approve it. The policy therefore by reason of the execution of the mortgage by the orator became void; but the orator claims that it was valid as to the personal property, situated in the dwelling-house, which was the first item insured by the policy.

This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but we think are easily reconciled by referring to the plain principles which should govern them. The general rule, “void in part void *in toto*,” should apply to all cases where the contract is affected by some all-pervading vice, such as fraud or some unlawful act, condemned by public policy or the common law; cases where the contract is entire and nondivisible; and all those cases where the matter that renders the

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policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible; the different properties insured for separate sums, and the risk upon the property which is claimed to be valid, unaffected by the cause that renders the policy void in part. Such are the cases of *Howard v. Cornick*, 24 Ill. 455; *Hartford Fire Ins. Co. v. Walsh*, 54 id. 164; s. c., 5 Am. Rep. 115; *Clark v. New Eng. M. F. Ins. Co.*, 6 Cush. 342; *Date v. Gore District M. F. Ins. Co.*, 14 Up. Can. C. P. 548; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Loehner v. Howe M. Ins. Co.*, 17 Mo. 247; *Koontz v. Hannibal S. & I. Co.*, 42 id. 126; *Cucullu v. Orleans Ins. Co.*, 18 Mar. (La.) 11.

In *French v. Chenango M. Fire Ins. Co.*, 7 Hill, 122, the policy covered a building and its contents, and was held void as to the former by omitting to state the existence of a plough shop within ten rods of the property insured, but valid as to the contents. Upon what principle a policy could be held void in part and valid in part for a misdescription of adjacent buildings, affecting the various items of the risk in equal degree, we are unable to determine. The case was substantially overruled by *Wilson v. Herkimer Co. M. Ins. Co.*, 6 N. Y. 53.

The cases following have held the contracts entire, indivisible, and no recovery could be had upon them. *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Associated F. Ins. Co. v. Assum*, 5 Md. 165; *Bowman v. Franklin Ins. Co.*, 40 id. 620; *Fire Association v. Williamson*, 26 Penn. St. 196; *Gottzman v. Penn. Ins. Co.*, 56 id. 210; *Bleakley v. Niagara D. M. Ins. Co.*, 16 Grant Ch. U. C. 198.

In the case at bar the whole property was insured for eight hundred and seventy-two dollars, divided into specific items, but one premium was paid and one premium note given. We think the authorities justify us in holding that the contract was an entire one; separate and distinct only so far as to limit the extent of the risk assumed by the company on each kind of property. The cost of the insurance was to be assessed upon the premium note, and the company had a lien upon the buildings insured, as security for the payment of any assessment which might be made upon the note. The incumbrance upon the buildings affected the security

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the company held for the payment of assessments which might be laid upon the note; thus the risk upon the personal property was affected by the cause which rendered the policy void as to the real estate. We think for these two reasons that the whole policy was void. *Friesmuth v. Agawam M. F. Ins. Co.*, 10 Cush. 587; *Brown v. People's M. Ins. Co.*, 11 id. 280; *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Me. 472; *Gould v. York Co. M. F. Ins. Co.*, 47 id. 403; *Day v. Charter Oak F. & M. Ins. Co.*, 51 id. 91; *Barnes v. Union M. F. Ins. Co.*, id. 110.

The views expressed render it unnecessary to pass upon the questions in the case as to proofs of loss, fraud and false swearing. The *pro forma* decree of the Court of Chancery is reversed, and cause remanded with a mandate that the bill be dismissed.

Judgment reversed.

VRAZEY, J., did not sit, having heard the case on demurrer.

GRANGER V. BATCHELDER.

(54 Vt. 243.)

Attorney and client—power to compromise.

An attorney has no implied power to compromise his client's cause of action.
(See note, p. 847.)

DEBT on judgment. The opinion states the case. The plaintiff had judgment below.

W. A. & O. B. Boyce and Heath & Carleton, for defendant.

J. O. Livingston, for plaintiff.

TART, J. The plaintiff, living in New York, held a judgment against the defendant for two hundred and eight dollars and four cents; one Randall was his attorney; property claimed by third persons had been attached, and the officer holding the execution issued upon the judgment refused to proceed unless indemnified. Randall, with positive instructions from the plaintiff not to compromise the claim, received in satisfaction and payment of the

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judgment the sum of one hundred and fifty dollars, and accepted assurances, procured by the defendant from the persons whose property has been levied upon, that they would not molest the officer and parties for what had been done in attaching their property. The execution was returned satisfied.

This suit is debt, brought upon the judgment, claiming to recover the amount due after the application of the sum paid in money. The case must be controlled by the general rule, so often held in this State, that an attorney without special authority has no power to bind his client by a compromise and settlement, or an assignment of the cause of action, without receiving the full amount in money. See *Penniman v. Patchin*, 5 Vt. 346; *Carter v. Talcott*, 10 id. 471; *Vail v. Mount*, 15 id. 314.

The fact that the client resides abroad does not change the rule. However inconvenient it may be for an attorney not to have access to his client, he is in fact, in these days of the rapid transmission of intelligence, often nearer to him in a distant city than he would be if he lived in the next town. If the rule as stated was good law in the days of yore, it certainly ought to be now, since means of communication have been so much improved and the telegraph and telephone are the adjuncts of almost every office.

We have no doubt that if Randall had had authority to bind the plaintiff in the settlement, the debt would have been extinguished, as he received in payment of it something besides money, something that the debtor was under no obligation to give him, a waiver by the persons whose property had been attached of their claims for damages; and this would have been a sufficient consideration for discharging the debt had Randall had authority for settling it in that manner. We think the plaintiff should recover.

Judgment affirmed.

NOTE BY THE REPORTER.—To the same effect is *Robinson v. Murphy*, Alabama Supreme Court, January, 1882. The court said: "The point of controversy decisive of the case is whether an attorney at law by virtue of his general retainer and authority can accept, in satisfaction of a judgment he has obtained for a client, a less sum than is really due, or for such sum make a transfer of the judgment, binding the client. The authority of an attorney to compromise pending litigation is fully recognized in the English courts upon the theory that he is, as to the matter involved in the litigation, the general agent of the client. See elaborate note of Prof. Green to § 24 (8th ed.), Story on Agency; Wharton on Agency, §§ 587-92. These learned authors express the opinion that the doctrine of the American courts coincide with that of the English courts. There would possibly be much of difficulty in supporting the opinion by a protracted examination of the decided cases. Whether we could in view of our former decisions follow the English rule it is not proper now to discuss. The client had obtained judgment terminat-

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ing litigation and its uncertainties, putting an end to all differences that could have been urged to the demand, the subject of the suit, and finally and conclusively ascertaining that he was entitled to have and recover of the defendant a certain fixed sum of money. The negotiations between the attorneys of the parties, leading to the arrangement which is termed a compromise, was not an offer to buy or sell peace against a doubtful or disputed claim, the subject of pending suit—it was intended as no more and is no more in truth than a proposition to satisfy the judgment by paying on the one side, and accepting on the other, a less sum than its full amount. There was no disputation of the amount or finality of the judgment. In all the negotiations there was nothing of confidential character, which would have excluded whatever may have transpired between the attorneys from being admitted as evidence, if it became material in subsequent suits between the clients. *Snodgrass v. Br. Brek. Decatur*, 25 Ala. 161.

"Prior to our statute in reference to composition of debts, if this transaction had occurred between the plaintiff and the defendant in the judgment, the acceptance in payment of a less sum would not have operated its satisfaction. There is a want of a valuable consideration for the agreement of a creditor to remit the whole on the payment of a part of a just and ascertained debt. *Barron v. Vandvert*, 18 Ala. 233; *Pearson v. Thomas*, 15 id. 900. It may be that under the statute, if the parties themselves had been the actors, there would have been a settlement in writing for the composition of the judgment, to which effect would have been given according to their intention, without inquiring into the consideration.

"The power of attorney is not co-equal, co-extensive, or the equivalent of that of the client. He is as has been said in numerous decisions of this court, a special agent, limited in duty and authority, to the vigilant prosecution or defense of the rights of the client. He can enter into no bargains or contracts, though he may make agreements in writing touching the course of proceedings in pending suits, or the issue or return of executions on judgments he may have obtained, which will bind the client, unless he has specially authorized or subsequently ratified them. 1 *Brick Dig.*, 191, § 30; *Albertson v. Goldsby*, 28 Ala. 711. On the payment of money to him after judgment he may give a valid receipt, but a sale or assignment of the judgment does not lie within the scope of his authority. *Boren v. McGhee*, 6 Port. 432. Nor can he accept any thing but money in satisfaction of the debt or judgment of the client. Within the limit of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, and of direction to ministerial officers, in the issue, levy and return of executions, the attorney may have large discriminating powers given him, that he may perfect and promote the rights and interests of the client. But entering into bargains or contracts, by which the debt of the client is released or discharged without full payment in money, is not one of his general powers. If the power is not especially conferred, the validity of all such bargains or contracts, so far as they affect the client, depends upon his ratification. He may ratify or repudiate as he believes most conducive to his interest. *Kirk's Appeal*, 87 Penn. St. 243; s. C., 30 Am. Rep. 337; *Levy v. Brown*, 56 Miss. 83; *Maddux v. Bevan*, 39 Md. 485; *Moye v. Cogswell*, 60 N. C. 93.

"All who deal with an attorney or other agent must ascertain the extent of his authority. If they do not inquire they can claim no protection, because they indulged suppositions or conjectures, reasonable or unreasonable, that the agent had authority he was exercising. *Gullet v. Lewis*, 3 Stew. 23. The law defines the extent of the general power of the attorney, and is presumed to be known of all men. More than fifty years ago—in the case of *Gullette v. Lewis* supra—the power of an attorney at law was defined, this court saying, he 'is the special agent of his client whose duties usually are confined to the vigilant prosecution or defense of the suitor's right. By virtue of his engagement as an attorney he is not authorized to compromise the matter of controversy, to execute a release of his client's demand, or even to release the responsibility of a witness to his client, that he may be rendered competent.' The compromise of which the court was speaking was not an adjustment of pending litigation, but the composition of an admitted debt. The authority of this case has never been disputed, and it has been often cited with approbation, as defining accurately the general power of an attorney. *West v. Ball*, 12 Ala. 340; *Chapman v. Cnoler*, 41 id. 103. Whoever has dealt, or may in this State deal, with an attorney, can have no right to rely on his exercise of any other power unless

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it is specially conferred. Whether it has been specially conferred, he must at his own peril ascertain. The acceptance by the attorney of a less sum than was due upon the judgment did not operate its satisfaction; and the transfer or assignment of the judgment was in excess of his authority."

So in *Township of North Whitehall v. Keller*, Pennsylvania Supreme Court, March 27, 1882, the court held: "There is a very general authority conferred upon attorneys at law in the conduct of suits, to refer them, to confess judgments and control executions. But there is a limit to this power; it is created for specific, not general purposes. When a claim is put into the hands of an attorney for collection without further instruction, it is generally understood to be for the purpose of having it enforced by legal process, and it is not presumed that the attorney either can or will, without process, compromise and settle it on such terms as either his judgment or caprice may dictate. The court does not say that such power can never be exercised by the attorney without express warrant from his client, for an implied power may result from the character of the claim requiring collection, and the circumstances connected with it. So if on the trial of a case the attorney should consent to a judgment less than the amount due, a court would not ordinarily, in relief of the client, set aside such judgment; but in such case in the conduct of a pending suit, the power of the attorney to direct and control it is undoubted. Nevertheless even in the example put, when the act of the attorney has been obviously wrong, and where the rights of the client have been seriously compromised, the court, notwithstanding the judgment, ought to grant relief. MARSHALL, C. J., in *Holker v. Parker*, 7 Cranch, 452. Compromises by attorneys, in the absence of and without the assent of their clients, are not looked upon with favor, though as was said in the case just cited, where the compromise is reasonable and fair, a court will not disturb it. Still it remains, as was said by WOODWARD, J., in *Stokely v. Robinson*, 10 Casey, 315, that 'the principle is that the compromise being an unauthorized act is void,' and this though it may assume the form of an award. To a like effect are the cases of *Huston v. Mitchell*, 14 S. & R. 307, and *Stackhouse v. O'Hara's Exr's*, 2 Harr. 88, in both of which cases the attorneys had agreed to take land in satisfaction of the debts of their clients." To same effect *Mackay's Heirs v. Adair*, Penn. Supreme Court, Nov. 1881.

In *Black v. Rogers*, Missouri Supreme Court, April, 1882, it was held that an attorney has no power, by virtue of his employment as such, to compromise his client's case; but where an attorney has apparent authority to make a compromise, and the compromise so made is not so flagrantly unfair as to imply fraud or to put the opposite party on inquiry, it will be upheld and enforced, although it may subsequently appear that the attorney exceeded his authority.

LEAVITT V. JONES.

(34 Vt. 438.)

Marriage — sale by husband to wife — increase of animals.

A husband sold his wife nine lambs for value, which were exempt from execution. *Held*, valid as to those lambs and their increase, and that no change of possession was necessary.

REPLEVIN. The opinion states the case. The defendant had judgment below.

French & Southgate, for plaintiffs.

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J. J. Wilson, for defendant.

ROYCE, C. J. The sheep replevied were attached upon a writ against the plaintiff, Van Buren Leavitt; and the only question presented is as to the ownership of seven of said sheep, survivors of a lot of nine lambs, which were sold by the said Van Buren to his wife, Eliza J., in the fall of 1875, and eleven others, the increase of said nine. The sale by the husband to the wife, shown by the case to have been for a valuable consideration, was valid. *Richardson v. Merrill's Est.*, 32 Vt. 27; *Richardson v. Wait*, 39 id. 535; *Child v. Pearl*, 43 id. 224; *Bent v. Bent*, 44 id. 555; *Spooner v. Reynolds*, 50 id. 437. There is nothing in the case to show, nor is any claim made, that it was in fraud of the husband's creditors; and it has been uniformly held in this State that a wife purchasing personal property with her own money, from her husband, as well as from a stranger, can hold the same as her separate property. The sale vested a perfect title in the wife, subject only to be defeated by the husband's creditors, if all the requirements of the law to constitute a sale and transfer good as against creditors of the vendor, were not met.

This being true, the increase of the sheep sold belonged to the vendee, Eliza J. Leavitt, from their birth. No change of possession of the young was required; because the husband never had any title or claim to them. When they were dropped, Mrs. Leavitt's title to the dams was undisputed; and according to the most familiar principles of the law, the young were hers from the moment of birth. As is said by POLAND, C. J., in *Bellows v. Wells*, 36 Vt. 599, speaking of the rule requiring change of possession of personal property in order to render a sale valid as against creditors: "The rule proceeds on the ground that permitting the former owner to remain in the use and apparent ownership of the property as before, gives him a false credit, and creditors may be embarrassed and injured by it. But the reason of the rule cannot apply to property which at the time of the sale is not subject to attachment, and has no real existence as property at all." In order to make charge of possession of personal property necessary, "there must have been some time when as against the vendee the vendor owned it, and had it in his possession." *Fitch v. Burk*, 38 Vt. 683.

These propositions are fully supported, if indeed any authority

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be needed to support them, by the recent case of *Hull v. Hull*, 48 Conn. 250; s. c., 40 Am. Rep. 165, and the authorities therein cited. In that case, which was replevin for six colts, it appeared that they were the progeny of two brood mares, which the plaintiff bought of the Rev. W. H. H. Murray in Boston, with the agreement that plaintiff might take them to Murray's farm in Connecticut, of which she was superintendent, and keep them as breeding mares, all the colts thereafter foaled from them to be the exclusive property of the plaintiff. The colts were attached by one of Murray's creditors, who claimed to hold them on the ground that there was such a retention of possession by Murray after the sale as to render it constructively fraudulent. The court, LOOMIS, J., say: "The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist, nor what is already in the possession of the vendee * * * it is very clear that the title to the property in question, when it first came into existence, was in the plaintiff. By the express terms of the contract the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear." That case seems analogous to the one at bar in principle. There it was provided by a contract that the young of the mares were to be the plaintiff's; here the dams were sold to the wife, and it is elementary that the owner of the dam, in the absence of any valid stipulation or arrangement to the contrary, owns her young from the moment of birth.

The eleven sheep, increase of the nine lambs, sold by Van Buren Leavitt to his wife, being the exclusive property of the wife, and not subject to attachment by the husband's creditors, it is not necessary to decide whether there was sufficient change of possession of the nine to constitute a sale of them valid as against his creditors. The case shows that at the time of the attachment seven of the nine survived, and the husband had no other sheep. They were therefore exempt from attachment under section 1556, R. L.; and no change of possession was necessary to complete a title in the wife under her purchase good against the husband's creditors. If at the time of the sale the nine lambs were legally subject to attachment, so that a change of possession was necessary to so effectuate the sale that the husband's creditors could not by proper proceedings avoid it, and such change of possession did not

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take place, yet if at any time previous to an actual attachment, either by act of the parties or operation of law, the lambs ceased to be attachable, change of possession would no longer be essential, and the fact would inure to the benefit of the wife's title and perfect it. When the husband sold all his other sheep, therefore, leaving these nine exempt under the statute, there was no longer any occasion for a change of possession, and the wife's title became absolute against the world. See authorities above cited and *Kendall v. Samson*, 12 Vt. 515; *Ridout v. Burlon*, 27 id. 383; *Foster v. McGregor*, 11 id. 595; *Jewett v. Guyer*, 38 id. 209; *Wilder v. Stafford*, 30 id. 399.

The judgment of the County Court is reversed, and judgment for the plaintiffs for one cent damages and their costs.

Judgment reversed.

DEWEY V. BROWNELL.

(54 Vt. 441.)

Mortgage — mortgagee in possession — claim for repairs.

One standing in the position of a mortgagee of land in possession before foreclosure, may add to the mortgage debt any excess of expenditure for necessary repairs over and above rents and profits; but neglecting to make such claim on foreclosure is bound by the decree, and cannot subsequently make such repairs a lien on the premises.

BILL to charge real estate with repairs. The opinion states the case. The orator had judgment below.

Norman Paul, for defendant.

William E. Johnson and *Warren C. French*, for orator

POWERS, J. The facts stated in the bill are by the demurrer conceded to be true.

It appears that Mrs. Gilbert, holding the mortgage upon the premises in question, brought her petition for a foreclosure thereof against Frederick G. Brownell and William H. Brownell, the original mortgagors, not knowing that they had then quit-claimed

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their equity of redemption to this defendant. Mrs. Gilbert's claim became absolute but was not binding on this defendant. The orator took a conveyance of the premises of Mrs. Gilbert after her decree became absolute, in ignorance of the fact that this defendant held the equity of redemption although the defendant's deed thereof was duly recorded long before Mrs. Gilbert foreclosed her mortgage. After his purchase the orator went into possession and made repairs and improvements which he now seeks to charge upon the land.

After making such repairs and improvements he discovered the record of the defendant's deed, and thereupon brought his petition to foreclose against the defendant, setting forth the same mortgage debt as Mrs. Gilbert had set forth in her petition of foreclosure, but making no claim for his repairs and improvements. He obtained in due time a decree for the payment of the mortgage debt declared for, which the defendant paid within the limited time.

In this bill the orator asks for a decree that the defendant pay his claim for the repairs and improvements, and in default thereof for a foreclosure. The orator taking possession under his deed from Mrs. Gilbert, stood as to this defendant as mortgagee in possession before a foreclosure. He was accountable for the rents and profits, and might make reasonable repairs and necessary improvements, at the charge of the mortgagor.

When he brought his petition to foreclose he might make his claim for such repairs and improvements and carry the same into the accounting of the sum due in equity to be paid on redemption.

The liability of a mortgagee in possession before foreclosure to account to the mortgagor for the rents and profits of the mortgaged premises, and the right to be allowed for proper repairs or improvements stands upon the same equitable ground and are each an incident of the account taken to ascertain the sum which in equity the mortgagor should pay to redeem the land. In taking the account, the rents and profits should primarily be applied in extinguishment of the claim for repairs, and any excess of rents and profits should be applied in payment of the mortgage debt.

If the repairs are not thus paid in full, the excess may be added to the mortgage debt.

The right to carry these items into the accounting does not how-

ever grow out of the mortgage itself, but is an equity arising *ex post facto* from the stewardship of the mortgagee over the mortgaged premises. It flows from his rightful possession of the premises, which he holds in trust, not only to preserve the estate but to apply its income in satisfaction of his debt. His tenure is at all times subservient to the mortgagor's right of redemption. But if the mortgagor redeems he must do equity if he would have equity. He can at any time regain possession by paying his debt. If he neglects this he ought to account for all proper expenditures which have been necessarily incurred through his default.

It is thus seen that the allowance for repairs and improvements is not properly a part of the mortgage debt, secured by the mortgage, but is an equitable charge for the administration of the estate, that is payable only on redemption. It is not like the mortgage debt, an independent claim for an account, but attaches incidentally to an accounting of the mortgage debt, either in proceedings to foreclose or under a bill to redeem.

If an account of the mortgage debt be taken, and no claim be interposed for repairs and improvements, nor deduction claimed for rents and profits, and a decree is passed thereon, such decree is conclusive of the sum required of the mortgagor as the price of redemption. And on payment of this sum as ordered by the decree, the premises are *eo instanti* relieved of the lien of the mortgage, and the mortgagor is entitled to the possession. The decree, so far as the account and the right of redemption are involved, has the conclusive effect of a judgment. In *Chapman v. Smith*, 9 Vt. 153, it appeared that in a foreclosure proceeding no account had been taken of certain rents and profits which were properly chargeable to the mortgagee, and the mortgagor had redeemed by paying the amount ordered by the decree. It was attempted in a trustee process to hold the mortgagee as the debtor of the mortgagor for these rents and profits omitted in the accounting under the foreclosure proceedings. The court held that the suit could not be maintained at law; but in the opinion discuss the effect of the decree in the former proceedings. Says WILLIAMS, C. J.: "The decree is conclusive as to the amount due on the mortgage, which of course settles all questions as to the rents received by him before that time;" and further on in the opinion he says: "We consider that the account between him (the mortgagee) and the mortgagor of the amount due on the mortgage, having been once taken by the

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master and accepted by the Court of Chancery, was conclusive between Smith and Hoyt, up to the time of making the decree." The court in that case intimated that if the mortgagor had any remedy it was a bill of review to correct the decree.

The same doctrine was advanced by Lord HARDWICKE in *Gould v. Tancred*, 2 Atk. 533, where the mortgagor after decree sought to correct the account between him and the mortgagee in possession. See also *Wortley v. Birkhead*, 3 Atk. 809.

No case has been cited that warrants a bill of this character, to charge a mortgagor, after a decree of foreclosure against him and payment of the sum found due on an accounting, with a further payment for repairs and improvements disconnected from the mortgage debt, and in default thereof for a further foreclosure of the same land that he has once redeemed from the burden of the mortgage.

The mortgagor could never read his title clear, if the mortgagee were thus allowed to disintegrate his claim, and multiply costs as well as suits.

The decree taken by the orator in his foreclosure proceedings conclusively settled the amount due him under the mortgage, and until that decree is set aside by some proper proceeding brought for the purpose it is a finality.

What rights, if any, the orator may have in an action at law, under our Betterments Act, is a question not arising in the case before us.

The decree of the Court of Chancery is reversed and the cause remanded, with directions to enter a decree dismissing the bill, with costs.

Decree ordered accordingly.

STEBBINS V. CENTRAL VERMONT RAILROAD COMPANY.

(54 Vt. 464.)

Negligence — contributory — when attaching.

Where the defendant's negligence caused a fire on the plaintiff's land, although the plaintiff's negligence increased the loss, the plaintiff may still recover for the damage done before his own negligence began to operate.

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CASE for injury to land by fire. The opinion states the point. The defendant had judgment below.

J. G. Eddy, for plaintiff.

J. L. Martin and Haskins & Goodnow, for defendant.

VRAZBY, J. It is not claimed by the defendant but that if the fire was burning on the plaintiff's premises when he first learned of it, his neglect to try and stop it then, though constituting negligence contributory to the damages thereafter accruing, would prevent his recovery for the damages already accrued, to which his negligence did not contribute, but which resulted solely from the defendant's negligence.

The only point of exception now insisted upon by the plaintiff is to the charge of the court to the jury. We think the charge would be understood by the jury as the plaintiff's counsel now claims : that is, if the plaintiff neglected to do what a prudent man would have done when he learned of the fire, it defeated his right of recovery for the previous as well as subsequent damages.

The point that the defendant makes is, that there was no pretense at the trial below that the fire had reached the plaintiff's premises when he was informed of it by Streeter, or that he had then suffered any damage, and insists that no claim can fairly and properly be made from the bill of exceptions that there was such claim.

The plaintiff insists the other way, and properly appeals to the bill of exceptions, which is our only guide.

We think the testimony of Streeter and the language of the court in the charge shows that there may have been such claim and that there was some ground for it. Giving the construction to the bill of exceptions which we think it demands, the charge of the court was in conflict with the rule conceded to be correct independent of statutory provisions ; to the effect that where the consequences of the defendant's negligence have subsequently been aggravated by the want of ordinary care, or by the negligence of the plaintiff, this may go in mitigation of damages ; but it cannot defeat the plaintiff's right to recover for the wrongs for which the defendant is responsible ; or in other words, that negligence on the part of the plaintiff tending merely to increase the damage suffered by him. 10

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not a bar to an action as to the damage resulting from the defendant's negligence before the contribution by the plaintiff. *Wilmot v. Howard*, 39 Vt. 447; Shearm. & Redf. on Neg., § 32, and cases cited in notes; Whart. on Neg., § 868 *et seq.*, and cases cited in notes.

Judgment reversed, and new trial granted.

BREWER V. WOODWARD.

(54 Vt. 581.)

Negotiable instrument — evidence to vary indorsement.

Where the owner of a note, not a party to it, indorses it in blank to another, parol evidence is competent in an action between them, to show an agreement that he was not to be liable in a certain event.*

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

H. S. Royce, for plaintiff.

C. P. Hogan, for defendant.

TAFT, J. This was an action of assumpsit to recover the amount due upon a promissory note. The note was payable to one Austin or bearer, and was owned by the defendant, who before its maturity writing his name in blank upon the back thereof, sold it to the plaintiff. The County Court admitted evidence offered by the defendant to show that at the time of the indorsement and sale of the note, it was agreed between him and the plaintiff, that unless the latter collected the note at its maturity, he would return it to the defendant, and if he did not the defendant should be discharged from all liability thereon. The plaintiff insists that the admission of such evidence was error.

The law is well settled that the undertaking evidenced by such an indorsement, as between the parties to it, is susceptible of being controlled by oral evidence of the real obligation intended to be

* See *Groves v. Johnson* (48 Conn. 160), 40 Am. Rep. 162.

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assumed at the time of signing. This has, says in *Sylvester v. Downer*, 20 Vt. 355, been this court that it seems needless to refer to the *v. Lane*, 5 id. 161; *Flint v. Day*, 9 id. 345; id. 554.

The evidence was properly admitted, and County Court is affirmed.

BARNBY V. PARSONS.

(54 Vt. 622.)

Guardian — care in loaning ward's

A guardian lent \$142 of his ward's money, and some taking no security but his single note for both said care and in good faith. *Held*, that he was not held by the subsequent bankruptcy of the borrower.

A PPEAL from Probate Court. The case.

John Howe and P. R. Kendall, for plaintiff

W. O. Dunton and Edward Dana, for defendant

REDFIELD, J. The plaintiff, as guardian loaned of his ward's money \$142.96, to one year he loaned some of his own money to said ward; Adams became bankrupt and the money was lost.

The referee reports that: "I am unable to find the plaintiff negligent or wanting in care in taking said note, there was no testimony before me but that of the defendant. Finding of the referee, though negative in form, under the circumstances detailed, to the positive statement that the plaintiff managed the property of his ward honestly and with fidelity."

The defendant offered no proof that the plaintiff

care, diligence or discretion. But it is claimed that the fact that the plaintiff mingled the ward's money with his own, and took the note of Adams payable to himself, without surety, is negligence *per se*. The familiar declaration of Lord KENYON is referred to "that no rule was better established than that a trustee could not lend on mere personal security; and it ought to be rung in the ears of every one who acts in the character of a trustee"; and cases are quoted from the English reports affirming the same general doctrine.

We feel no inclination to abate in the least from the strict and rigid requirements of the fiduciary, in regard to his *cestui que trust*, or impair in any degree the protection which the law throws about him. But in this country the titles to real estate, especially in new settlements, are uncertain and unstable, and desirable mortgages cannot always be attained; we had no public stocks in which the faith of the government was pledged, until the late war, and they now bear such premiums, and many of them liable to be called in and replaced by those bearing less interest, that it is often impracticable or undesirable to make investments in such property, so that the only practical rule is to require of a trustee good faith, diligence and care. Our statute substantially makes this requirement; "An executor or administrator shall not make profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the personal estate." Sec. 2097, R. L.: "A guardian shall account for and dispose of the personal property of the ward, as executors and administrators account for and dispose of personal estate." Sec. 2454, R. L. Our population are mainly farmers, with small estates; and when one dies, one of the same class of good repute is sought for to care for the property of his widow and children. They have not read Blackstone carefully, and are not familiar with Lord KENYON's equity judgments; but they have sound judgment and discretion, and are familiar with honest fidelity, diligence and care.

There is also a distinction, well known in the text books and adjudged cases, between capital sums, permanently invested for income, and temporary loans of current funds, in small sums on hand which are not needed in the present, but may be required in the administration of the property to pay taxes or other contingent expenses. If such small sums might safely be made to earn a few dollars for the ward the guardian would be in the line of his duty to cause it to be done. If the arbitrary rule was made to control,

Barney v. Parsons.

that in no case could the trustee loan on personal securities, funds would be locked up that might safely be made to produce income to the widow and the ward. And no arbitrary rule can be made a substitute for strict fidelity, sound discretion, diligence and care. Williams Exrs., 1894-'5-'6; Perry Trusts, 560-5; 16 How. 545.

II. The fact that the guardian included a small note due the ward in the note of Adams, payable to himself, if that fact has occasioned no loss, would not of itself render the plaintiff liable. The report does not show that the guardian omitted to keep a full record of the amount in said note that belonged to his ward. Indeed the exact statement of the sum that belonged to the ward shows that the money of the ward was kept separate, but was included in the same securities, with the money of another. The case does not indicate that there is claim of actual negligence or fault in the plaintiff; the defense introduced no evidence; and it is stated in argument that plaintiff appealed by reason of the disallowance of some small charges for personal services; and it seems that in the County Court there was no dispute in matters that concerned the appeal, but the plaintiff got cost in a matter not complained of in Probate Court. The plaintiff

"— aimed at duck or plover,"

and failed, but being faithful and without actual fault, in the management of his trust, we think he should not be made liable by construction.

The judgment of the County Court is reversed and the balance in the hands of the guardian is adjudged to be \$52.09, and the notes in his hands as stated in the report. To be certified to the Probate Court, with costs to the plaintiff, and his expenses of appeal to be taxed by the clerk on notice.

Judgment accordingly.

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2. **Action for wrongfully causing death — death of wrong-doer.]** The statutory right of action for wrongfully causing death of a person abates by the death of the wrong-doer before action. *Russell v. Sunbury* (Ohio), 533.

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2. **Bank receiving draft for collection at a distance — negligence of sub-agent.]** A bank receiving for collection a draft payable at a distant place, and transmitting it to its correspondent bank at that place, is not liable for loss through the negligence of the latter. *Guelich v. National State Bank of Burlington* (Iowa), 110.
3. **Contract by public officer — execution.]** A contract, phrased, "We promise to pay," and signed by two with the respective additions of "president school board" and "secretary school board," but containing no reference to any school district, is a personal obligation, not variable by parol. *Wing v. Glick* (Iowa), 118.

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6. Railway company and station agent.] A railway station agent, authorized to receive and forward freight, has implied authority to contract to furnish a certain number of cattle cars at his station, on a specified day, the shipper being ignorant of any limitation of such power. *Harrison v. Missouri Pacific Railway Company* (Mo.), 818.

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2. President — authority to transfer negotiable paper.] The president of a bank has no inherent authority to indorse or transfer negotiable paper belonging to the bank, but such authority may be implied by his habit, known to the directors, of doing acts of the same general character. *Smith v. Lawson* (W. Va.), 688.

3. Bank receiving draft for collection at a distance — negligence of sub-agent.] A bank receiving for collection a draft payable at a distant place, and transmitting it to its correspondent bank at that place, is not liable for loss through the negligence of the latter. *Guelich v. National State Bank of Burlington* (Iowa), 110.

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2. Connecting — limitations.] A connecting carrier, receiving property for transportation from the first carrier, the original contract contemplating such employment, is liable directly to the shipper for his negligence, and is entitled to all limitations in the original contract. *Halliday v. St. Louis, Kansas City & Northern Railway Company* (Mo.), 809.

3. Responsibility for freezing of goods — act of God.] On the 18th of February, at Parkersburg, B. delivered potatoes to a railway company for transportation to Grafton, in time to be shipped on the 14th. There was a daily train between those points. They did not arrive until the 16th, and were then frozen. The weather was mild on the 18th and 14th, but freezing on the 15th and 16th. Held, that the railway company was liable for the damage. *McGraw v. Baltimore & Ohio Railroad Company* (W. Va.), 696.

4. Lien — part delivery.] A carrier having delivered part of a quantity of goods consigned to one person, without collecting the freight, has a lien therefor upon the part undelivered, even as against the consignor's right of stoppage in transit. *Potts v. New York & New England Railroad Company* (Mass.), 247.

5. Railroad company — delivery of goods at point where no station.] A railroad company receiving goods for carriage is not bound to make personal delivery nor give notice of arrival; and where the destination is a mere flag station, without any agent, depot or warehouse, and this is known to the consignee, and is not unreasonable in view of its business, its liability of every sort terminates with the delivery of the goods in its car on the side track at the destination. *South and North Alabama Railroad Company v. Wood* (Ala.), 749.

6. — stop-over tickets.] A regulation of a railroad company, requiring passengers desiring to stop over between the starting point and the destination to procure stop-over tickets, is reasonable. *Forton v. Milwaukee, Lake Shore and Western Railway Co.* (Wis.), 28.

7. — ejection for non-payment.] If a passenger asks a conductor for a stop-over ticket, and by his mistake receives only a trip check, the second conductor may lawfully eject him for non-payment of additional fare. *Id.*

CARRIER — Continued.

2. — damages.] A railway passenger, who ignorantly and in good faith tenders a tax-certificate for his fare, may not be ejected as a trespasser, and if before ejection another person offers to pay his fare for him, the carrier must receive it and carry him; and if notwithstanding he ejects him, he is liable to punitive damages. *Louisville and Nashville Railroad Company v. Garret* (Lea), 640.

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3. **Taxation — of attorneys.]** A city may impose a special tax upon lawyers by legislative authority. *City of Wilmington v. Macks* (N. C.), 442.

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1. **Disobedience of injunction to discontinue trade.]** The defendant sold to the plaintiff his druggist's business, and agreed not to carry on that business in that town. Subsequently he bought a new stock, and opened the like business at the same stand. He was enjoined by the court from so carrying on that business. Within a week thereafter he sold his new stock to two farmers, residing several miles distant, ignorant of the business and paying no personal attention to it, and commenced acting as their hired man and agent in that business at the same stand. *Held*, that he was guilty of contempt in disobeying the injunction, and could not purge himself by disavowal. *Baker v. Cordon* (N. C.), 448.

CONTRACT.

1. **Architect's certificate — bad faith.]** Where a building contract provides for the acceptance of the architect, evidence is admissible to show that he acted collusively and in bad faith. *Tetz v. Butterfield* (Wis.), 29.
2. **Bishop engaging priest.]** A bishop is not liable for the salary of a priest whom he has engaged. *Rose v. Vertin* (Mich.), 174.
3. **Breach of marriage promise — whether excused by disease.]** The defendant failed to fulfill a contract of marriage upon the ground that he was afflicted with a venereal disease which rendered him unfit for the married state. *Held*, that he would be answerable in damages if the disease was contracted subsequently to the time of making the promise, or if before and he knew his infirmity was incurable; but if it was contracted prior to the promise, and he had reason to believe it was temporary only, he would be excusable. *Allen v. Baker* (N. C.), 444.
4. **Oral promise to devise.]** An oral promise to devise is revocable, and as to real estate, is void, and the consideration paid may be recovered if the devise is not made as agreed. *De Moss v. Robinson* (Mich.), 144.
5. **Part delivery — time of payment.]** The defendant agreed to buy all the fruit raised by the plaintiff and delivered at its works, at a uniform price per pound. As it ripened the plaintiff delivered, and the defendant accepted, quantities from time to time, but declined to pay for any until the whole was delivered. The plaintiff discontinued delivering, and sued for the price of that delivered. *Held*, maintainable. *Veerkamp v. Hulburd Canning and Drying Co.* (Cal.), 266.
6. **Duress — novation — consideration.]** In November, 1879, brewers contracted with an ice company for ice during the season of 1880 at \$1.75 a ton, or \$2 if the crop proved short. The crop failed, and in the next May the company notified the brewers that they would no further perform the contract. Thereupon the brewers, having a large amount of beer on hand

CONTRACT — Continued.

- liable to spoil, made a new arrangement with the company, agreeing to pay \$8.50 a ton, and received and paid for some ice at that rate, and gave their note for other ice at the same rate. *Held*, valid and enforceable. *Goebel v. Linn* (Mich.), 723.
7. Immoral — cornering the market.] A loan for the purpose of making a "corner" in wheat cannot be recovered. *Raymond v. Leavitt* (Mich.), 170.
8. To settle mortgage — cancellation.] A contract by one to settle a mortgage made by the other imposes a personal liability to pay the debt; but may be cancelled by the parties before knowledge and acceptance by the mortgagee. *Gilbert v. Sanderson* (Iowa), 108.
9. Statute of frauds — public policy. An oral agreement that the one of two joint mortgagees of personal property shall buy it at judicial sale, the other not attending nor bidding, and shall hold, use and dispose of it for the benefit of both, is not within the statute of frauds nor against public policy. *Hunt v. Elliott* (Ind.), 794.
10. Of two, to donate lands to railway — statute of frauds — public policy.] Two several owners of lots in a town, being desirous that a railway station should be located near them, agreed orally that if it should be located on the land of either, and the railway company should demand a gratuitous conveyance, the other would convey to the former half as many lots as he should have conveyed to the railway company. One owner having conveyed lots accordingly, *held*, that he might maintain an action against the other for the value of one-half thereof, the contract being void neither as against public policy nor under the statute of frauds. *Harris v. Roberts* (Neb.), 779.
11. To discontinue trade-name — public policy.] Jacob S., having established a ready-made clothing business under the style of "Little Jake," sold the business to the plaintiff, with the benefit of the use of that name, and stipulated not to use it in a rival business. The plaintiff conducted the business under his own name. *Held*, that the plaintiff might enjoin the defendant from a violation of that agreement. *Grow v. Seligman* (Mich.), 787.
12. Not to carry on business — breach.] An agreement by a milkman not to sell milk in a certain town is not broken by selling, at his farm outside that town and to persons residing outside that town, although with knowledge that the purchaser intends selling in that town. *Smith v. Martin* (Ind.), 806.
13. Unconscionable.] A dissolute and inexperienced spendthrift, 25 years old, mortgaged all the real estate to which he was entitled under his father's will, for \$5,000, as collateral to his note for that amount, made up as follows: \$1,000 in cash; a due-bill of \$47 surrendered; \$199 interest credited on a previous mortgage; \$110.85 premiums paid on a life insurance policy assigned to the mortgagee; and \$556.75 retained to pay subsequent annual premiums thereon; and \$8,200 for a conveyance of 160 acres of land worth \$1,000. The mortgagee was familiar with the mortgagor's circumstances, and required him to buy the land as a

CONTRACT — Continued.

condition of lending the money, although the mortgagor knew nothing of the land and had no use for it. *Held*, unconscionable, and that the land should be re-deeded, but that the mortgage should stand for the actual loans, indebtedness, advances and credits, if the insurance policy were re-assigned. *Butler v. Duncan* (Mich.), 711.

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2. Negotiable paper irregularly issued.] A private corporation, authorized to issue negotiable paper, is bound by its note in the hands of an innocent holder for value, although in executing it the corporation exceeded the amount of indebtedness which it was authorized to incur. *Auerbach v. Le Sueur Mill Company* (Minn.), 285.
3. Oral promise to subscribe for stock.] An oral promise, pending the organization of a corporation, to take shares of the stock, does not constitute the promisor a stockholder or member, and will not support a note given by him to pay for such shares. *Fanning v. Insurance Company* (Ohio), 517.
4. Railroad — power to contract for transportation for fixed time.] A railroad company, authorized "to do all acts needful to carry into effect the objects for which it was created," including the right to exact a compensation not exceeding a specified rate for transportation of persons and property, may contract for the transportation of freight for a fixed period. *Railroad Company v. Furnace Company* (Ohio), 509.
5. Ultra vires.] Neither a railroad corporation nor one for the manufacture and sale of musical instruments has any power to guarantee the payment of expenses of a public musical festival, although such festival was reasonably expected to be of pecuniary benefit to the guarantors, and expense was incurred in reliance upon the guaranty. *Davis v. Old Colony Railroad* (Mass.), 221.

COVENANT.

Not to permit trades on granted premises — change in character of neighborhood.] Owners of adjacent premises in the city of New York mutually covenanted that only dwelling-houses should be erected thereon, and not to carry on or suffer any kind of manufacture, trade or business thereon. Subsequently the value of the premises for any but trade purposes was greatly impaired by the advance of business, and the erection and operation of an elevated railway in the street. *Held*, that the covenant ran with the land, but owing to the change in circumstances and the defeat of the scheme of the original covenantors, it would not be specifically enforced against a subsequent purchaser. *Trustees of Columbia College v. Thacher* (N. Y.) 865.

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CRIMINAL LAW.

1. **Adultery — joint indictment — conviction of one.]** On an indictment against a man and a married woman for adultery, the man alone may be convicted although the woman was too drunk to consent to the intercourse. *Commonwealth v. Bakeman* (Mass.), 248.
2. **Assault — ejection from a railway station.]** A railway station keeper has no right to eject a passenger from the station for spitting on the floor. *People v. McKay* (Mich.), 169.
3. **— by one in loco parentis.]** A girl of fifteen years old, living with her elder brother and being supported by him, is subject to moderate restraint and correction at his hands. *Snowden v. State* (Tex.), 667.
4. **— on several — bar.]** The defendant fired twice in quick succession upon a crowd of persons who were conducting riotously about his house, and wounded A. at the first fire and B. at the second. *Held*, that an acquittal upon an indictment for assault upon A. is no bar to an indictment for an assault upon B. *State v. Nash* (N. C.), 472.
5. **— with intent to commit rape.]** The prosecutrix with a boy six years old was trundling a carriage with a baby in it. The defendant seventy-five yards distant shouted, "Halt, I intend to ride in the carriage; if you don't halt, I'll kill you when I get hold of you." The prosecutrix ran, trundling the carriage, and the defendant pursued, telling her to stop until she came up with another woman. *Held*, insufficient to convict of assault with intent to commit rape. *State v. Massey* (N. C.), 478.
6. **Bigamy — evidence.]** In a prosecution for bigamy there can be no conviction where the evidence as to the first wife showed only that she was alive three years before the second marriage. *People v. Feilen* (Cal.), 258.
7. **Blackmailing — threat in order to compel payment of debt.]** A threat to accuse another of crime, if made for the purpose of inducing payment of a just debt, is not within the statute of blackmailing. *State v. Hammond* (Ind.), 791.
8. **Burglary — intent.]** One who breaks and enters a building with intent to steal money from a safe is guilty of burglary, although there is no money in the safe. *State v. Beal* (Ohio), 490.

CRIMINAL LAW — Continued.

9. **Evidence — confession under intoxication.]** A confession made by one intoxicated at the time is not incompetent for that reason. *State v. Greer* (Min.), 296.
10. **— burden of proof of insanity.]** On a criminal trial the burden of proof of insanity is upon the prosecution, but the presumption that every man is sane is sufficient to sustain that burden until repelled. *O'Connell v. People* (N. Y.), 379.
11. **—** So where the court charged, "he is presumed to be a sane man until he convinces you by evidence that he is insane," *held*, correct. *Id.*
12. **— cross-examination of prisoner.]** One on trial for murder, testifying for himself, was asked on cross-examination if he had not been arrested for assault with intent to kill. The question was objected to but the objection was overruled, and the prisoner answered without claiming his privilege. *Held*, no error. *Hanoff v. State* (Ohio), 493.
13. **— dying declarations as to abortion.]** Dying declarations of the victim of an abortion are admissible on a prosecution for death thereby. *Montgomery v. State* (Ind.), 815.
14. **— constitutionality.]** The admission of dying declarations is not a violation of the constitutional provision that the accused shall be confronted with the witnesses. *Id.*
15. **— hearsay — expert as to burglary.]** In a trial for burglary the owner of the premises had described certain footprints to a witness. The witness was permitted to testify that the shoes of the defendant, produced on the trial, would have made such tracks. *Held*, error. *Blutt v. State* (Tex.), 663.
16. **False pretenses — character of horse.]** An influential and intentionally false representation by the seller to the purchaser on the sale of a horse, that the horse is sound, kind and true, the falsity not being apparent, is indictable as false pretenses. *Watson v. People* (N. Y.), 397.
17. **Former conviction fraudulently obtained.]** A criminal conviction fraudulently obtained by the offender is no bar to a subsequent prosecution for the same offense. *State v. Simpson* (Minn.), 269.
18. **Homicide — jurisdiction.]** A statute authorizing a prosecution for murder to be had in the county where the fatal blow was struck although the victim died out of the State, is valid. *Green v. State* (Ala.), 744.
19. **Incest — ignorance.]** In incest, one party having knowledge and the other being ignorant of the relationship, the former may be convicted and the latter acquitted. *State v. Ellis* (Mo.), 821.
20. **Jury using intoxicating drink.]** The use of intoxicating drink by a jury in a capital case after retirement will not vitiate the verdict unless it affected it, or the drink was supplied by an interested party. *State v. Baber* (Mo.), 314.
21. **Larceny — dogs — "personal goods."] Dogs are not subject of larceny at common law, nor under the statute of larceny as "personal goods," they not being taxed and their owners being required to register and tag them. State v. Doe** (Ind.), 599.

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1. **Attorney's fees.]** An unpaid reasonable demand of attorneys for procuring the dissolution of an attachment is a proper item of damages in an action upon the undertaking. *Raymond v. Green* (Neb.), 768.
2. **—.]** In an action of assault and battery evidence of the value of the services of the plaintiff's attorney in the action is incompetent. *Stevenson v. Morris* (Ohio.), 481.
3. **Measure of.]** In an action on an assumption of a mortgage by the grantor's acceptance of a deed binding him to pay it, the measure of damages, after the maturity of the mortgage, is the amount due thereon. *Locke v. Homer* (Mass.), 199.
4. **— trover against innocent buyer from trespasser.]** An innocent purchaser of logs from one who has got them by willful trespass is liable in trover to the owner for their value when the defendant first acquired them. *Tuttle v. White* (Mich.), 175.
5. **— mental suffering—remoteness.]** A passenger on a railway, negligently carried beyond her destination, but receiving no personal injury or insult, may not recover for anxiety, effects on her health, nor danger in consequence of the train stopping an insufficient time to enable her to get off. *Trigg v. St. Louis, Kansas City and Northern Railway Company* (Mo.), 805.
6. **Remoteness — action of tort.** A pregnant woman, passenger on a railway train, was carelessly directed by the brakeman to leave the train at a station three miles short of her destination. This was on a cloudy night, she could not see the station, and being a stranger there, she walked until she reached her destination. The exertion brought on a miscarriage and sickness. *Held*, that the defendant was liable for this injury. *Brown v. Chicago, Milwaukee and St. Paul Railway Company* (Wis.), 41.

Measure of.] See MASTER AND SERVANT, 277.

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Dying.] See CRIMINAL LAW, 744, 815.

DEED.

1. **Boundary — highway.]** A deed of land beginning at a point on the side of a road, and running thence by courses and distances to the road, and thence along the road to the place of beginning, does not convey to the center of the road. *King's County Fire Insurance Company v. Stevens* (N. Y.), 861.

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2. **Recording — quit-claim.]** In the hands of an innocent purchaser a recorded quit-claim deed takes precedence of a deed made by the same grantor. *For* . . .
3. **Voluntary — husband to wife — evidence to show** of lands from husband to wife, expressed to be out of love and affection, and one dollar paid, is voluntary as to the wife, and if assailed by them, parol evidence will not show a valuable consideration. *Houston v. Black*
- From husband to wife.]** *See* MARRIAGE, 453.

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Conveyance by implication—right of flowing by dam. A deed conveyed to plaintiff, with a covenant of quiet enjoyment, a mill, with a dam and pond for supplying the water for the mill, and the use of the dam, the use of which caused the pond to overflow the land of the plaintiff, who owned the adjoining premises above on the other side of the dam, was not known to the plaintiff at the time of purchase. The plaintiff brought an action to reduce the height of his dam. *Held*, that an action lay for breach of the covenant. *Adams v. Conover* (N. Y.), 391.

EMINENT DOMAIN.

Railway in street — riparian rights.] A horse railway may not be laid in a city street, solely as a freight transfer track between two steam railways without compensation to the adjoining land owners; and this is so, although the street is on land made by filling below low-water mark in a navigable river or lake. *Clark v. Stillwater Street Railway and Transfer Company* (Minn.), 290.

ESTOPPEL.

1. **Purchaser from fraudulent assignor.]** One who has purchased goods from another who had previously made a fraudulent assignment of them is estopped, like his vendor, from impeaching the assignment. *Bynum v. Miller* (N. C.), 467.
2. **Surety on guardian's bond.]** The surety on a guardian's bond, executed to enable him to sell his ward's real estate, is estopped, after the sale and receipt of the money, to deny his appointment as guardian. *Gray v. State ex rel. Mills* (Ind.), 545.

EVIDENCE.

1. **Amount of, in civil action, for indictable act.]** To warrant a recovery in a civil action for an indictable act, only a preponderance of evidence is necessary. *Welch v. Jugenheimer* (Iowa), 77.
2. **Of good character in civil action.]** In a civil action for maliciously burning property, proof of the defendant's good character is inadmissible. *Barton v. Thompson* (Iowa), 119.
3. **Declarations of agents.]** In an action against a railway company for running over a man, evidence of admissions by trainmen to one another immediately after the accident is inadmissible. *Adams v. Hannibal and St. Joseph Railroad Company* (Mo.), 383.
4. **— of corporation.]** An admission by the general agent of a telegraph company of its liability for an accident alleged to have been caused by its negligence, two months after the accident, is incompetent. *Randall v. Northwestern Telegraph Company* (Wis.), 17.
5. **Profits of business.]** In an action of damages for personal injuries incapacitating the plaintiff from attending to his business as a manufacturer, evidence of the average profits of such business is incompetent. *Bierbach v. Goodyear Rubber Company* (Wis.), 19.
6. **Preponderance of witnesses.]** It is error to charge that if witnesses are equally credible, the greater number are entitled to the greater weight. *Id.*
7. **Scientific books.]** Extracts from books proved to be "standard works in the medical profession" may not be read to the jury as evidence. *Stilling v. Town of Thorp* (Wis.), 60.

Of bigamy.] See CRIMINAL LAW, 258.

Confession.] See CRIMINAL LAW, 293.

EVIDENCE — Continued.

Of consideration.] See DEED, 756.

Of custom.] See NEGLIGENCE, 405.

See AGENCY, 532; CRIMINAL LAW, 879, 496, 666, 744, 815; LIMITATION, 682; NEGOTIABLE INSTRUMENT, 857; TELEGRAPH, 500; WILL, 682; WITNESS, 708.

EXECUTION.

1. **Exemption — head of family.]** A husband living as a boarder for seven years, separate from his wife, and not contributing to her support, they having no children, is not the "head of a family" within the statute of exemption. *Linton v. Crosby* (Iowa), 107.

2. **— double — "implement."]** A printer's printing-press is exempt from execution as an implement of trade. But a printer, who is also a money-lending agent, cannot exempt his press unless he derives his principal support from printing. *Jenkins v. McNall* (Kans.), 432.

EXEMPTION.

See EXECUTION, 107, 432; PENSION, 496.

FALSE PRETENSES.

See CRIMINAL LAW, 397.

FIXTURES.

1. **Of hotel.]** By a deed of a hotel, "with the appurtenances and improvements thereunto belonging," executed in pursuance of a contract providing that the vendor might remove his furniture, pictures and carpets, but none of the "permanent fixtures and appurtenances," the gas fixtures and fittings, the kitchen range and boiler, a patent water filter, tanks and mosquito screens were held to pass. *Pratt v. Whittier* (Cal.), 251.

2. **Mortgagee.]** Manufacturers of machinery allowed the tenant of a mill to put it on trial. It was put in in such a manner as to be capable of removal without injury to the mill. The tenant refused to accept it, and left the premises without removing it. Held, that it became a fixture as to a prior mortgagee of the mill. *Hamilton v. Huntley* (Ind.), 598.

FORMER CONVICTION.

See CRIMINAL LAW, 399.

FRAUD.

1. **Constructive — contract between administrator and distributee.]** A contract between an administrator and one of his distributees, by which the latter sells the former all his interest in the estate, is presumptively void, but mere inadequacy of consideration will not avoid it. *Williams v. Powell* (Ala.), 742.

2. **False representation on sale of business — buyer's laches.]** One proposing to buy an interest in a business and a stock of goods, having ample oppor-

FRAUD — Continued.

tunity to examine and investigate, may not rely on the seller's representations as to value of the goods or extent of the business. *Poland v. Brownell* (Mass.), 215.

See SALE, 519, 630

GIFT.

Delivery.] One in his last illness delivered a bank check to another, with instructions to deliver it to a third on the drawer's death, and to return it to the drawer if he should recover. Nine days afterward the drawer died, and the check was delivered to the payee. *Held*, not a valid gift. *Walter v. Ford* (Mo.), 312.

GUARANTY.

1. **Continuing.]** A guaranty to pay for goods to be sold "from time to time," not exceeding a specified sum, continues until the amount unpaid reaches that limit, although the aggregate of purchases may exceed it. *Crittenden v. Flaks* (Mich.), 146.
2. **Notice of acceptance.]** When a guaranty, absolute in form, waives notice of times or amounts of sales, the guarantor is not entitled to notice of acceptance. *Id.*
3. **—.]** An absolute agreement of guaranty requires no notice of acceptance. *Wilcox v. Draper* (Neb.), 763.
4. **Whether continuing.]** B., about to commence business, applied to the plaintiffs for goods on credit. The plaintiffs wrote him that they would be willing to fill "his order" if he would give them the defendant, who, they said, they understood indorsed for him. The defendant thereupon wrote them that he had read their letter, and asked them to "fill said bill," adding, "I indorse Mr. B., and I hope he may become one of your best customers." *Held*, not a continuing guaranty. *Perryman v. McCall* (Ala.) 752.

GUARDIAN AND WARD.

Care in loaning ward's funds.] A guardian lent \$142 of his ward's money, and some of his own, to one person, taking no security but his single note for both sums. He acted with due care and in good faith. *Held*, that he was not liable to the ward for loss by the subsequent bankruptcy of the borrower. *Berney v. Parsons* (Vt.), 858.

HOMICIDE.

See CRIMINAL LAW, 744.

HUSBAND AND WIFE.

See CIVIL DAMAGE ACT, 282.

IGNORANCE.

Of fact.] See CRIMINAL LAW, 231.

INCEST.

See CRIMINAL LAW, 881.

INJUNCTION.

See CONTEMPT, 448 ; WATERCOURSE, 882.

INNKEEPER.

Liability for money stolen from guest.] An innkeeper is liable for money stolen from his guest, the guest himself not having been negligent, and there being no evidence to show how or by whom it was stolen. *Dunbar v. Day* (Neb.), 772.

INSANITY.

See MARRIAGE, 883.

INSOLVENCY.

See SALE, 690.

INSURANCE.

1. **Cancellation — agency.]** A policy of insurance may not be cancelled except by stipulation in the policy or extraneous agreement, and an agent to procure insurance has no implied power to make such agreement. *Reichchild v. American Central Ins. Co.* (Mo.), 808.
2. **Change of title or possession — sale on execution.]** Sale of real estate on execution, the owner having a term for redemption, is not a change in the title or possession, within the meaning of the insurance policy, where the loss occurred during that term. *Oamuel v. Queen's Ins. Co.* (Wis.), 1.
3. **Contributory negligence.]** The plaintiff was insured against accidents while travelling on conveyances of any common carrier, provided he complied with the rules and regulations of the carrier and exercised due diligence for self-protection. While riding on a railway car, on approaching a station, he stood on the steps, in violation of the carrier's rule, known to him, and was thrown therefrom and injured. *Held*, that he could not recover on the policy. *Bon v. Railway Passenger Assurance Company* (Iowa), 127.
4. **Misrepresentation — materiality.]** Where a fire insurance policy is conditioned to be void "in case of any misrepresentation whatever," any misrepresentation, whether material or not, will avoid it. *Graham v. Fireman's Ins. Co.* (N. Y.), 349.
5. **Subsequent.]** A policy of insurance, conditioned to be void for other insurance without consent, is avoided by a subsequent policy not consented to, although containing the like condition. *Somerfield v. State Ins. Co.* (Lea), 662.
6. **—.]** A policy of insurance, conditioned to be void in case of other insurance, above a certain sum, without written consent, is avoided by subsequent valid insurance above that sum not consented to, although such subsequent insurance also avoided certain other insurance contemporaneous

INSURANCE — Continued.

with the policy in question, and thus brought the amount of insurance within the amount allowed by that policy. *Royal Ins. Co. v. McCrea* (Lea), 656.

7. **Void in part — severability.]** If an insurance policy on real and personal property is conditioned to be void if the property shall be mortgaged, and the real estate is mortgaged, the policy is void unless the properties are insured for separate sums and the risk on the personalty is not affected by the mortgage. *McGowan v. People's Mutual Fire Ins. Co.* (Vt.), 843.
8. **Waiver — knowledge of general agent.]** A fire insurance policy on a distillery provided that it should be void if the distillery should be run at night. It always had been, and continued to be run at night, to the knowledge of the general agent who delivered the policy. *Held*, a waiver. *American Central Ins. Co. v. McCrea* (Lea), 647.
9. **—.]** A fire insurance policy provided that it should be void in case of other insurance without written consent on the policy, and that the use of general terms or any thing less than a distinct specific agreement, clearly expressed and indorsed on the policy, should not be a waiver of any condition. There was other subsequent insurance, notified to the general agent, who assented, but postponed indorsing consent for his own convenience. *Held*, as waiver. *Id.*

INTENT.

See CRIMINAL LAW, 490.

JUDGMENT.

1. **Impeachment of, in equity.]** A court of equity will not decree a judgment lien to be invalid for want of legal notice to the defendant, where the plaintiff was not guilty of misconduct and the defendant had actual knowledge of the pendency of the action, unless a meritorious defense is shown. *Gifford v. Morrison* (Ohio), 537.
2. **Effect of reversal of, on judicial sale.]** *See* SALE, 455.
3. **Former.]** *See* MASTER AND SERVANT, 584.
4. **Former conviction.]** *See* CRIMINAL LAW, 269.

JURISDICTION.

See MARRIAGE, 507; CRIMINAL LAW, 744.

JURY.

1. **Constraint of, by judge — splitting difference.]** A jury came into court and reported that they could not agree, and "stood eleven to one, and divided on \$200" The judge told them it would be better for one or both sides to yield, and that a disagreement over so small a matter would be unfortunate. *Held*, error. *Goodsell v. Seeley* (Mich.), 183.
2. **Disqualification — when objection must be raised.]** The objection that a juror was not an elector must be raised before verdict, even in a capital

JURY — Continued.

case, it not being an absolute disqualification, but only ground of challenge. *State v. Jackson* (Kans.), 494.

3. Using intoxicants.] See CRIMINAL LAW, 814.

LACHES.

See FRAUD, 215; SURETY, 193.

LANDLORD AND TENANT.

1. Bishop and priest — occupancy of real estate.] A Roman Catholic priest, in charge at the will of the bishop, and occupying a dwelling-house belonging to the church, is a servant, and not a tenant, and his right of occupancy ceases with his service. *Chatard v. O'Donovan* (Ind.), 782
2. Dangerous premises.] See NEGLIGENCE, 884.

LARCENY.

See CRIMINAL LAW, 599

LEASE.

1. Of land on shares — assignability.] A lease of land, to be worked on shares with the lessor's implements, is not assignable. *Randall v. Chubb* (Mich.), 165.

LIBEL.

1. Charge of searching house for stolen goods.] A false and malicious publication that one's house had been searched, under legal process, for stolen goods supposed to be secreted therein, is libellous *per se*. *State v. Smiley* (Ohio), 487.
2. Misprinting communication in newspaper.] A newspaper publisher is not liable in damages for ludicrous but innocent misprints in a communication ostentatiously puffing the writer and describing a surgical operation by him. *Sullings v. Shakespeare* (Mich.), 166.
3. Mutual banter.] Where an article ridiculing a person for ostentation was published in a newspaper as the result of mutual banter between the publisher and the person described, with the knowledge and assent of the latter, the question of libel is for the jury. *Id.*

LIEN.

See CARRIER, 247; MECHANICS' LIEN, 117; VENDOR AND PURCHASER, 90.

LIMITATION.

1. Statute of — promise by joint debtor.] A promise by one joint debtor before maturity of the debt will not prevent the attaching of the statute of limitation as to another. *Campbell v. Brown* (N. C.), 464.
2. — new promise — evidence.] A debtor wrote to his creditor: "You shall be paid as I get the money over and above my bread and meat;" "if I get the money I will then pay you;" "I have acknowledged the

LIMITATION — Continued.

debt to you in my letters again and again, and therefore it stands as good as if you had my bond." *Held* a valid acknowledgment and promise in writing to remove the bar of the statute of limitations. Also *held*, that parol evidence was competent to identify the debt. *Abrahams v. Seena* (W. Va.), 692.

MARRIAGE.

1. **Agency of wife for husband.]** A wife engaged a seamstress to do work in her husband's family, agreeing on the amount of wages, but not stating who was to pay her, the seamstress knowing that she was married. While the work was going on the wife told the seamstress that she had property of her own, which she was going to sell, and when she sold it she would pay her, and she did afterward pay her a small sum on account. *Held*, that no action would lie against the wife. *Flynn v. Messenger* (Minn.), 279.
2. **Deed from husband to wife.]** A deed directly from husband to wife will not be upheld where she is an adulteress or the provision is extravagant. *Warlick v. White* (N. C.), 453.
3. **Divorce — decree of another State — jurisdiction.]** A decree of divorce under a statute of Colorado authorizing divorce when neither party is domiciled there, is no defense in a prosecution for bigamy in Ohio, when the parties were domiciled in the latter State at the time of the decree. *Van Fossen v. State* (Ohio), 507.
4. **Insane husband — guardianship of.]** The natural guardianship of an insane husband, of full age but without a legal guardian, is in the wife rather than in his father; and the wife may enter the father's dwelling, where the husband and wife had an exclusive temporary apartment, and remove her husband, in spite of the father's opposition. *Robinson v. Frost* (Vt.), 885.
5. **Sale by husband to wife — increase of animals.]** A husband sold his wife nine lambs for value, which were exempt from execution. *Held* valid as to those lambs and their increase, and that no change of possession was necessary. *Leavitt v. Jones* (Vt.), 849.

See CIVIL DAMAGE ACT, 386.

MASTER AND SERVANT.

1. **Breach of contract — remedy — former judgment.]** A servant wrongfully discharged may sue for breach of contract or for wages earned, and in the former case a recovery equal to the amount of wages up to the time of the action bars any further action. *Richardson v. Eagle Machine Works* (Ind.), 584.
2. **Contract for compensation.]** Under a contract by a master to pay a servant what the master thinks right after the services are performed, the measure fixed by the master is presumptively the measure of compensation, and although considerably less than the reasonable value of the services, it is still conclusive in the absence of proof of fraud or bad faith. *Butler v. Winona Mill Company* (Minn.), 277.
3. **Course of employment.]** A boy eight years old jumped upon the steps of a passenger railway car and sat on the platform, to steal a ride. The con-

MASTER AND SERVANT — Continued.

- ductor or brakeman kicked him off the car while the train was moving some ten miles an hour, and he was injured. *Held*, that a recovery against the railway company was warranted. *Hoffman v. New York Central and Hudson River Railroad Company* (N. Y.), 387.
4. —.] Defendant owned and ran a ferry-boat between Hudson and Athens on opposite sides of the Hudson river. On a regular trip the pilot took on a boatman without compensation, agreeing to put him on his boat in a tow passing up the river. Similar acts had occasionally been done before, but not to defendant's knowledge. The ferry-boat diverged from its regular course, and negligently colliding with a canal-boat, killed the plaintiff's intestate. *Held*, that the defendant was liable. *Quinn v. Power* (N. Y.), 392.
5. Dangerous machinery.] An inexperienced boy of seventeen, employed to work on visibly dangerous machinery, is entitled to warning of the danger from his employer. *Dowling v. Allen* (Mo.), 293.
6. — Fellow-servant.] The foreman and general superintendent of a machine shop hired a boy and told him to do whatever K., another employee, directed him. K. being in charge of dangerous machinery, told the boy to do a certain act in regard to it, whereby he was injured. *Held*, that K. and the boy were not fellow-servants as to that act, and the boy could recover against the principal. *Id.*
7. Negligence — alter ego.] Where an absent master carries on business by a superintendent with general powers, he is liable to an employee injured through the neglect of the superintendent in respect to machinery. *Mitchell v. Robinson* (Ind.), 812.
8. — car from another road — fellow-servant.] A brakeman in coupling freight-cars for the defendant was injured by a loose dead-wood on a car which had come from another road. The defendant had competent inspectors whose business it was to reject such cars. *Held*, that the brakeman could not recover of the defendant. *Smith v. Flint and Pere Marquette Railway Company* (Mich.), 161.
9. — fellow-servant.] A railway brakeman was injured by collision with another train, moving in the opposite direction, and which had been negligently sent out by the train dispatcher. *Held*, that he had no cause of action against the railway company. *Robertson v. Terre Haute and Indianapolis Railroad Company* (Ind.), 552.
10. — railroad receiving unsafe car from another.] A railroad company, receiving a loaded car from another company to be run over its road, is not bound to test the safety of the car for its servants, but may assume its safety unless the contrary appears. *Ballou v. Chicago, Milwaukee and St. Paul Railway Company* (Wis.), 81.

MEASURE OF DAMAGES.

See DAMAGES; MORTGAGE, 199.

MECHANICS' LIEN.

"Improvement upon land"—breaking prairie.] Breaking prairie is not an "improvement upon land," for which a mechanics' lien will lie. *Brown v. Wyman* (Iowa), 117.

See MORTGAGE, 784.

MEMORANDUM.

See NEGOTIABLE INSTRUMENT, 198.

MINES.

Lateral support.] The doctrine of lateral support does not apply as between owners of adjoining gold-mining claims, where the process of working is to tear down the soil and wash it. *Hendricks v. Spring Valley Mining and Irrigation Company* (Cal.), 257.

MISTAKE.

Deed — "more or less."] Where by mutual mistake 206 acres were conveyed as "about 223 acres, be the same more or less," the price being fixed at so much an acre, and a mortgage given for part, the grantee was held entitled to a corresponding abatement therefrom. *Paine v. Upton* (N. Y.), 371.

See WILL, 493.

MORTGAGE.

- 1. Chattel — on pregnant mare.] A purchase-money mortgage on a pregnant mare covers the colt unless it is weaned before the maturity of the mortgage. *Kellogg v. Lovely* (Mich.), 151.**
- 2. On chattel for purchase-price — mechanics' lien.] A mechanics' lien for repairs of a chattel is subordinate to a prior duly recorded mortgage thereon for the purchase-money. *Denison v. Shuler* (Mich.), 734.**
- 3. Contract by grantee to assume — measure of damages for breach.] The acceptance of a deed covenanting that the premises are free from incumbrances except a mortgage, "which the grantee assumes and agrees to hold the grantor harmless from," binds the grantee to pay the mortgage debt; and in an action on that agreement after maturity of the mortgage, the grantor may recover the amount due thereon, although he may have paid no part of it. *Locke v. Homer* (Mass.), 199.**
- 4. On crops — possession.] A mortgage on a growing crop, the mortgagor remaining in possession, is invalid as against his grantee of the premises without reservation. *Coman v. Thompson* (Mich.), 706.**
- 5. Mortgagee in possession — claim for repairs.] One standing in the position of a mortgagee of land in possession before foreclosure may add to the mortgage debt any excess of expenditure for necessary repairs over and above rents and profits; but neglecting to make such claim on foreclosure is bound by the decree, and cannot subsequently make such repairs a lien on the premises. *Dewey v. Brownell* (Vt.), 852.**

MORTGAGE — Continued.

6. Mortgagor acquiring tax title.] A mortgage being conditioned for the payment of the taxes by the mortgagor, he cannot acquire a valid tax title to the premises as against the mortgagee, during the life of the mortgage, although the mortgagor has sold the premises and there is no personal covenant that he shall pay taxes. *Allison v. Armstrong* (Minn.), 281.
7. Partly illegal — enforcement.] A mortgage on land, executed in part for an illegal consideration, the amount of that part being certainly ascertainable, may be enforced for the legal portion. *Shaw v. Carpenter* (Vt.), 837.

See CONTRACT, 193 ; FIXTURES, 593.

MUNICIPAL CORPORATION.

1. Action over for nuisance.] If a municipal corporation is held by judgment for damages in consequence of the unsafe condition of its sidewalk, it has a remedy over against the person causing the nuisance, unless as between itself and him it was a wrong-doer; but such person is not concluded by such judgment unless he had notice of and an opportunity to defend that action; and if he had not, the injured person must be shown to have been free from negligence. *Catterlin v. City of Frankfort* (Ind.), 627.
2. County's duty to replace bridges.] A county, bound by statute to repair public bridges, is bound to replace or rebuild them when substantially destroyed. *State ex rel. Roundtree v. Board of Commissioners* (Ind.), 821.
3. Adoption of private bridge.] A county adopting a private bridge becomes bound to keep it in repair. *Id.*
4. Injunction against.] Unless forbidden by its charter, a city may not be enjoined from erecting a suitable city hall. *Torrent v. Common Council of Muskegon* (Mich.) 715.
5. Negligence — defect in street.] A gas company in a town had obtained the consent of the town authorities to lay its pipes in the street upon agreeing to leave the streets in good condition and not unnecessarily to allow ditches to be left open. In so laying pipe it allowed a ditch to remain open for several days. The plaintiff fell into the ditch at night and was hurt. *Held*, that an action would lie against the town. *Russell v. Inhabitants of Town of Columbia* (Mo.), 825.
6. — dangerous premises — servant.] If a city lets rooms in a public building with the services of a janitor, it is responsible for a personal injury caused by his negligence in the care of the building to one lawfully there by invitation of the hirer. *Worden v. New Bedford* (Mass.), 185.
7. Right to drain through highway outside.] A municipal corporation exercising ordinary care and skill may use a public way, lying outside its boundaries, for the purpose of drainage, without any liability for damages to adjacent property owners. *Cummins v. City of Seymour* (Ind.), 618.
8. Letting work.] A city is not bound to let public work to contractors. *Id.*
9. Street railway — legislative authority for.] A street horse-railway may be placed and operated on a city street without compensation to abutting

MUNICIPAL CORPORATION — Continued.

lot owners, the city having granted the right by ordinance in pursuance of legislative authority. *Richels v. Evansville Street Railway Company* (Ind.), 561.

NEGLIGENCE.

1. Contribution — in pari delicto.] If a person maintains a hatchway in his sidewalk unsafe for travellers, and another takes and leaves the cover off, and a traveller being injured thereby recovers damages against the occupant, the latter cannot recover indemnity of the intermeddler. *Churchill v. Holt* (Mass.), 191.
2. Contributory—icy sidewalk.] The plaintiff attended an evening entertainment at the defendant's public hall, and on coming out slipped on snow and ice accumulated on the plank sidewalk in front of the door, and was injured. *Held*, that he was not precluded from recovery by the fact that he noticed the snow and ice on going in. *Dewire v. Bailey* (Mass.), 219.
3. — riding on car platform.] It is not necessarily negligent for a passenger to ride on the front platform of a street car. *Nolan v. Brooklyn City and Newtown Railroad Company* (N. Y.), 345.
4. — trespasser on railway track — custom.] A railway company constructed, for its track, in an ungraded and unimproved city street, an elevated embankment, and in connection with it a trestle-work crossing a creek, high above the water, without railings or flooring. The plaintiff's wife while attempting to walk over the trestlework was injured by a car. *Held*, that the plaintiff was without remedy, in the absence of wanton negligence on the defendant's part, and that proof of a custom of foot passengers to cross the trestle-work was improper. *Mason v. Missouri Pacific Railway Company* (Kans.), 405.
5. — leaving railway train under way.] A railway train not stopping at a station a reasonable length of time to allow passengers to alight, one undertook in spite of warnings to get off after the train had started, and was injured. *Held*, that she was guilty of contributory negligence fatal to recovery. *Jewell v. Chicago, St. Paul and Minneapolis Railway Company* (Wis.), 63.
6. — when attaching.] Where the defendant's negligence caused a fire on the plaintiff's land, although the plaintiff's negligence increased the loss, the plaintiff may still recover for the damage done before his own negligence began to operate. *Stebbins v. Central Vermont Railroad Company* (Vt.), 855.
7. Dangerous premises — landlord and tenant.] Defendant rented one floor of a building to L. for a laundry, and supplied him with motive power by a revolving shaft driven by steam. L. erected a partition near the shaft. The plaintiff, in L.'s employ, endeavoring to pass between the partition and the shaft, was caught by the shaft and injured. *Held*, that he had no cause of action against defendant. *Ryan v. Wilson* (N. Y.), 884.
8. Of druggist.—contributory.] In an action against a druggist for injury by negligence of his clerk in selling sulphate of zinc for Epsom salts, it

NEGLIGENCE — Continued.

- is no defense that the medical treatment was negligent, but a charge that the defendant is liable without regard to negligence or legal fault is error. *Brown v. Marshall* (Mich.), 728.
9. **Ice sidewalk.]** The owner of a city lot is not liable for an injury sustained by one passing over his sidewalk and slipping on ice formed thereon by water dripping from the dwelling, the steps and the grounds, and the melting of snow; there being no defect in the premises, no interference by the defendant with the sidewalk, and no duty imposed on him by statute or ordinance to take care of the sidewalk. *Moore v. Gadsden* (N. Y.), 852.
10. **Proximate and remote cause of injury.]** A municipal corporation, leaving a dangerous and unfenced excavation in a public street, is liable to the owner of a horse, carefully driven upon the street, which taking fright runs away, falls into the excavation, and is killed. *City of Graceland v. Smith* (Ind.), 612.
11. **—.]** If a traveller, driving on a highway and approaching a railroad crossing, is personally free from negligence, and the railway company neglects to give warning of the approach of a train, the traveller is not debarred from recovering for injury by collision by the fact that his horse, frightened by the engine, suddenly starts forward, and draws the driver into the danger. *Cosgrove v. New York Central and Hudson River Railroad Company* (N. Y.), 855.
12. **Railroad company — dangerous structure — interloper.]** The plaintiff without invitation or business, intruded upon a visibly ruinous but uninclosed freight house of the defendants, used only for storage, and while there a sudden storm blew a fragment of the building upon him and injured him. *Held*, that he was remediless. *Lary v. Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company* (Ind.), 572.
13. **— interloper on car.]** On the request of a railway employee, the plaintiff, not in the company's employment, got on a slowly moving car on a switch and applied the brake, and while so occupied was injured by a collision with other cars, negligently produced by other servants of the company. *Held*, that he had no remedy against the company. *Eberhart v. Terre Haute and Indianapolis Railroad Company* (Ind.), 567.
14. **— absence of flagman from street crossing.]** In an action for personal injury sustained by a traveller upon a city street by collision with a railway train at a crossing, evidence of the absence of the flagman customarily stationed there to the plaintiff's knowledge is competent. *Pittsburgh, Cincinnati and St. Louis Railway Company v. Yundt* (Ind.), 580.
15. **—.]** The omission of a railroad company to maintain a flagman at a highway crossing may be considered on the question of its negligence, in an action for an injury to a traveller, driving on the highway, caused by the sudden escape of steam from a locomotive. *Hart v. Chicago, Rock Island and Pacific Railroad Company* (Iowa), 93.

NEGLIGENCE — Continued.

16. **Ship-master.]** The master of a vessel cannot escape responsibility for its safe management by intrusting it to a charterer. *Ouddy v. Horn* (Mich.), 178.
 17. **Concurrent negligence.]** A passenger on a public steamboat, injured by its collision with another, in consequence of a negligence of the officers of both, may hold both owners liable. *Id.*
 18. **State not liable for.]** The State is not answerable in damages for injuries sustained by a convict in its prison through the negligence of the prison officers. *Clodfelter v. State* (N. C.), 440.
 19. **Stock running on unfenced railway — injury to fireman.]** A railroad fire man was killed by collision of the engine with a steer straying on the track. The railway company owned the right of way in fee simple; the owner of the steer owned the land adjoining on both sides; the railway was unfenced, and the owner of the steer was in the habit of turning his cattle loose on his land. There was no statutory duty to fence. *Held*, that there was no cause of action against the owner of the steer. *Sherman v. Anderson* (Kans.), 414.
 20. **Contributory.]** See INSURANCE, 127.
 21. **In executing note.]** See NEGOTIABLE INSTRUMENT, 604.
- See MUNICIPAL CORPORATION, 185, 325; TELEGRAPH, 500; MASTER AND SERVANT, 81, 161, 298, 392, 552, 812.

NEGOTIABLE INSTRUMENT.

1. **Alteration — memorandum on back.]** A memorandum made on the back of a note by the holder, in pursuance of an agreement with the maker, but without the knowledge of a surety, to the effect that the rate of interest, after a specified day, will be less than that provided in the note, is not an alteration, and does not discharge the surety. *Cambridge Savings Bank v. Hyde* (Mass.), 198.
2. **Bona fide holding.]** A note obtained by duress and fraud, and without consideration, is void in the hands of a third person who is a general purchaser of the payee's notes, knowing his fraudulent practices in obtaining them. *Ormsbee v. Howe* (Vt.), 841.
3. **—.]** One who buys five promissory notes of the face value of \$100 each, secured by mortgage on real estate for \$30 a few days before one of them is due, may properly be found not a *bona fide* purchaser. *Smith v. Jansen* (Neb.), 761.
4. **Demand of payment.]** No demand is necessary to bind an indorser of a note where the maker has removed from the State before its maturity, leaving no one to represent him. *Whitely v. Allen* (Iowa), 99.
5. **Evidence to vary indorsement.]** Where the owner of a note, not a party to it, indorses it in blank to another, parol evidence is competent in an action between them, to show an agreement that he was not to be liable in a certain event. *Brewer v. Woodward* (Vt.), 857.
6. **Negligence in executing.]** One who, being unable to read or write English, signs and delivers a promissory note in English, fraudulently represented

NEGOTIABLE INSTRUMENT — Continued.

- to him to be a different paper, is liable thereon to an innocent purchaser, if he fails to require one of his sons, present at the time and able to read English, to read the instrument to him before signing. *Williams v. Stoll* (Ind.), 604.
7. Notice of dishonor — when timely.] The second indorser of a negotiable note, residing at Warren, Maine, having received due notice of dishonor by mail, being over eighty years old, and wishing to consult counsel, drove on the same day to the neighboring town of Thomaston, and there mailed to defendants notice of dishonor, addressed to them at New York, their residence, by the mail leaving at 1:40 P. M., which passed through Warren at 2 P. M. There was also a mail leaving Thomaston at 10:10 A. M., and Warren at 9:30 A. M. *Held*, timely notice. *Smith v. Poillon* (N. Y.), 408.
8. Transfer as collateral — accommodation indorser.] An accommodation indorser of a negotiable note without restriction is liable to one receiving it in good faith from the owner, before maturity, solely as collateral security for an antecedent debt. *Pitts v. Fogleson* (Ohio), 540.
9. Uncertainty of time of payment.] A note is rendered non-negotiable by a provision that "if the agent does not sell enough in one year, one more is granted." *Miller v. Poage* (Iowa), 82.
10. Witness — accommodation indorser to prove alteration.] In a suit against an accommodation indorser by an innocent holder the indorser is competent to prove a material alteration. *Jones v. Matthews* (Lea), 688.
11. Irregularly issued.] *See* CORPORATION, 285.

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NOTICE.

- Of acceptance.]** See GUARANTY, 763.
Of dishonor.] See NEGOTIABLE INSTRUMENT, 402.

NOVATION.

See CONTRACT, 723.

NUISANCE.

1. **Ice sidewalk.]** A pipe discharging water from the roof of a city building upon the sidewalk, and there forming ice, but not itself extending upon the sidewalk, and properly constructed, is not a nuisance *per se*. *Wensick v. McCotter* (N. Y.), 358.
2. **Water conductor — continuance of.]** Where one buys premises having upon them one such discharge-pipe for the accommodation of his and adjoining premises, but changes the flow, and does not use the pipe for his own premises, but the pipe continues to discharge the water from the adjoining premises, he is not liable to one who, passing along the sidewalk, falls upon ice formed by such discharge, and is injured. *Id.*

See MUNICIPAL CORPORATION, 627.

OFFICE AND OFFICER.

1. **County treasurer — loss of funds.]** A county treasurer is liable for loss of the county funds deposited by him generally in a bank, although the bank was reputed solvent and such deposit was necessary for the safety of the funds. *State v. Moore* (Mo.), 322.
2. **Public enemies.]** Thieves, tramps and robbers are not "public enemies" within the rule exempting bailees. *Id.*
3. **Officer de facto — claim to compensation.]** A public officer *de facto* may not recover compensation from the public for his services in the office. *McCus v. County of Wapello* (Iowa), 184.
4. **Personal liability of public officer.]** The trustees of a State institution are not personally liable for a mere wrongful and illegal breach of contract. *Chamberlain v. Clayton* (Iowa), 101.
5. **Resignation — when takes effect.]** The resignation of a public office does not take effect until acceptance or something equivalent. *State v. Clayton* (Kans.), 418.

See CONTRACT, 118.

PARENT AND CHILD.

See CRIMINAL LAW, 637.

PARTNERSHIP.

What is not.] An advance of money to purchase and erect buildings, for interest and one-half the profits of sale, which the receivers guarantee at a certain amount, the advances and profits being secured by mortgage, does not constitute the party advancing a partner as to third persons. *Curry v. Fowler* (N. Y.), 848.

PAYMENT.

Application of—security.] Where a debtor makes voluntary payments on a continuous account of several items, forming but one debt, and neither party makes any special application, the law will apply them according to priority of time; and the rule is not changed, although there may be a resulting trust in favor of the creditor available for the satisfaction of the earlier items, but not for the later. *Hersey v. Bennett* (Minn.), 871.

See SALE, 266.

PENSION.

Exemption—statute construction.] Under the statute exempting pension-money “in course of transmission,” the money is not exempt where the pensioner sells the pension draft to a bank, and is credited in his general account with the proceeds, and portions of the same are from time to time checked out by him. *Crans v. White* (Kans.), 408.

PROXIMATE AND REMOTE CAUSE

See NEGLIGENCE, 855, 612.

PUBLIC POLICY.

See CONTRACT, 737, 779, 794.

RAILROAD.

Public regulation.] A regulation by a railway company forbidding hackmen, peddlers, expressmen and loafers from entering a passenger-room at the station is valid, but a hackman with a check for baggage may enter the baggage-room therefor. *Summitt v. State* (Iowa), 637.

Street.] *See* EMINENT DOMAIN, 290; MUNICIPAL CORPORATION, 561.

See AGENCY, 418; CARRIER, 23, 31, 749; CORPORATION, 509; NEGLIGENCE, 93, 414, 567, 572, 580.

REAL PROPERTY.

Crops when not.] As between a purchaser of land on a foreclosure sale and the mortgagor's tenant, crops planted by the latter, and mature when the sheriff's deed is executed, although not severed, do not pass by the sale. *Hecht v. Dettman* (Iowa), 181.

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See EMINENT DOMAIN, 290; WATER-COURSE, 333.

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Obstruction to.] *See* WATER AND WATER-COURSE, 12.

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SALE.

1. False representation of agency — title.] H., relying on the representations of R. that he was the agent of L., agreed to sell chattels of his to L., on credit, delivered them to L., and received part of the price from R. R. was not such agent and had no authority to purchase for L. L. bought the chattels from R. without knowledge of the fraud. *Held*, that title did not pass, and that H. could recover their value of L. less the amount paid by R. *Hamet v. Letcher* (Ohio), 519.
2. Fraud—insolvency.] Where one buys goods intending not to pay for them, the vendor may recover the goods from his assignee. *Belding v. Frankland* (Lea), 630.
3. Implied warranty — bran for cattle.] A farmer bought of a miller a sack of bran for his cows. Before it was removed from the mill two copper clasps accidentally fell into it, without negligence on the miller's part, and one of the cows swallowed them and was killed thereby. The bran was part of a quantity on hand open to inspection. There was no express warranty. *Held*, that the buyer had no remedy against the seller. *Lukens v. Pretz* (Kans.), 429.
4. Judicial reversal of judgment.] The title of an innocent purchaser of land under a judicial decree is not affected by the subsequent reversal of the decree for irregularity. *Sutton v. Schomwald* (N. C.), 455.
5. Payment—rescission.] The plaintiff agreed to buy of the defendant the cattle of a certain brand, then running in the defendant's herd, but of an uncertain number, at a fixed price per head, and paid down a certain amount, but no time was fixed for delivery or completing the payment.

SALE — Continued.

The plaintiff notified the defendant that he would receive the cattle on a certain day, and on that day the defendant tendered the cattle, and the plaintiff offered in payment a check payable two days after sight. The defendant refused to accept any thing but cash, and declined to deliver the cattle. Some days afterward the plaintiff tendered the balance of the price, and later on the same day the defendant tendered the part paid. Both tenders were refused, and the plaintiff brought replevin. *Held* not maintainable. *Beauchamp v. Archer* (Cal.), 266.

By husband to wife.] *See* MARRIAGE, 849.

SET-OFF.

In action against principal and surety.] In an action on an undertaking against principal and surety, the principal may set off a demand due him from the plaintiff. *Raymond v. Green* (Neb.), 763.

SHIP-MASTER.

See NEGLIGENCE, 178.

SLANDER.

Actionability of words.] Words merely charging that the plaintiff administered morphine to another on the day he made his will, and that if it had not been for that, the plaintiff's daughters would not have got what they did, are not actionable *per se*, nor with an innuendo that the plaintiff had unlawfully administered poison causing death. *McFadin v. Dowd* (Ind.), 587.

SPECIFIC PERFORMANCE.

Revocable contract.] Where a contract for a lease provides that the lessee may terminate the lease in whole or in part, on certain notice, *held*, that specific performance would not be decreed. *Rust v. Conrad* (Mich.), 720.

STATE.

Liability for negligence.] *See* NEGLIGENCE, 441.

STATUTE.

1. Amendment.] A special municipal charter may be amended by a general law. *Richels v. Evansville Street Ry. Co.* (Ind.), 561.
2. Construction — "written order" — telegram ordering adjournment of court.] A telegram from a judge to the clerk of the court, ordering an adjournment, is a "written order," and warrants the adjournment. *State v. Holmes* (Iowa), 121.
3. — woman lawyer.] A woman may not be admitted to the bar as a "citizen." *Robinson's case* (Mass.), 289.
4. — of pension money.] *See* PENSION, 403.

STATUTE OF FRAUDS.

1. Debt of another — oral acceptance of order.] An oral acceptance of an order to pay money is invalid where the acceptor has no funds of the drawer in his hands at the time of acceptance. *Walton v. Mandeville* (Iowa), 123.
2. Promise to pay another's debt.] Manufacturers contracted with lumber dealers to convert certain standing timber into shingles and siding. A logger contracted with the manufacturers to cut and haul the timber. Subsequently the dealers orally promised the logger to pay him on orders from the manufacturers. Several payments were so made, and then payment being refused, this action was brought to enforce it. *Held*, not maintainable. *Preston v. Young* (Mich.), 148.
3. Sale of lands — signing memorandum.] Under the statute of frauds a memorandum of a contract for the sale of lands need be signed only by the vendor. *Gartrell v. Stafford* (Neb.), 767.

See CONTRACT, 779, 794.

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SUNDAY.

1. Action for fraudulent representations to induce contract on.] No action lies for fraudulent representations inducing to a contract made on Sunday, although the representations were criminal. *Gunderson v. Richardson* (Iowa), 81.
2. Constitutionality of law of.] The statute prohibiting labor on Sunday is constitutional, although it provides that it shall not affect those who conscientiously observe the seventh day as the Sabbath. *Johns v. State* (Ind.), 577.
3. "Necessity" — repairing railway.] It is lawful to make necessary repairs of a railway track on Sunday in order to avoid delaying trains on week days. *Yonaski v. State* (Ind.), 614.
4. — telegraphing on.] A contract made on Sunday to telegraph the words, "Come up in morning, bring all," is void, and a breach of it will not warrant a recovery of the statutory penalty for failure to transmit. *Rogers v. Western Union Telegraph Company* (Ind.), 558.
5. — or charity — travelling on.] A travelling insurance agent, being solicited by letter from his sick sister, temporarily residing in another State, to meet her and carry her home, wrote her to make other arrange-

SUNDAY — Continued.

ments, if possible, and inform him by letter addressed to him at B. He expected to reach B. on a Saturday evening, but missing connections, failed to do so, and took a Sunday train on defendant's road, a fortnight later, to reach B. and get the expected letter. Receiving personal injuries on that train by the defendant's alleged negligence he brought this action. *Held*, not maintainable. *Bucher v. Michburg Railroad Company* (Mass.), 216.

SURETY.

For faithful performance — laches of principal.] An insurance agent gave bond for faithful performance according to the company's by-laws. A by-law required monthly accounting and paying over. He accounted regularly, but one month neglected to pay over the whole balance due, and after that his indebtedness increased, without notification to the sureties, until it exceeded the penal sum. *Held*, that the sureties were not discharged. *Watertown Fire Insurance Company v. Simmons* (Mass.), 196.

See ESTOPPEL, 545.

TAXATION.

Of dogs — constitutionality.] A law taxing dogs and appropriating the proceeds to payment of damage done by dogs to sheep is a constitutional exercise of police power. *Van Horn v. People* (Mich.), 159.

Of attorneys.] *See CONSTITUTIONAL LAW*, 443.

TELEGRAPH.

1. Negligence — stipulation to limit liability.] A telegraph company may not stipulate for immunity for liability for its own negligence. *Telegraph Company v. Grinstead* (Ohio), 500.

2. Burden of proof.] Where a telegraph company has inaccurately transmitted a message, the burden is on it to show its freedom from fault. *Id.*

See STATUTE, 121.

TRESPASS ON THE CASE.

Intrusion at child-bed.] Where a physician takes an unprofessional unmarried man with him to attend a case of confinement, and no real necessity exists for the latter's assistance or presence, both are liable in damages to the woman, although she supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence. *De May v. Roberts* (Mich.), 154.

TRUST.

Charitable — to suppress intoxication.] A bequest of money to the trustees of an organized church, in trust to apply the interest to the suppression of the manufacture and sale of intoxicating liquors, is valid. *Heine v. Allen* (Ind.), 555.

ULTRA VIRES.

See CORPORATION, 731.

VENDOR AND PURCHASER.

1. **Executed parol purchase — rights of subsequent judgment creditors.]** One who has purchased land by parol, paid the price, and entered into and retains peaceable possession, will be protected in equity against the claim of a subsequent judgment creditor of his vendor. *Snyder v. Martin* (W. Va.), 670.
2. **Lien — waiver.]** One who takes in payment for real estate the secured and indorsed note of a third person, supposed to be good, thereby waives his lien, although it proves worthless. *Kendrick v. Eggleston* (Iowa), 90.

WAIVER.

See VENDOR'S LIEN, 90.

WARRANTY.

See SALE, 429.

WATER AND WATER-COURSE.

1. **Damage by boom company]** A corporation authorized by the legislature to construct a boom in a navigable river is not liable for flowage of land caused by an extraordinary freshet, not reasonably to have been anticipated and guarded against, although to some extent occasioned by the boom, the boom having been properly constructed. *Borchardt v. Wausau Boom Co.* (Wis.), 12.
 2. **Riparian owner on navigable river — diversion by State.]** A riparian owner on a navigable stream is not entitled to damages for a diversion of the water by the authority of the State for the improvement of navigation, without compensation to the State or the riparian owner. *Black River Improvement Co. v. La Crosse Booming and Transportation Co.* (Wis.), 66.
 3. **— injunction.]** The upper of two neighboring mill-owners on the same stream may divert the water on his own land by an artificial channel, provided he restores it to the natural channel, with reasonable care and prudence and without appreciable injury to the lower owner; and may store or pond the water so long as is reasonably necessary; but may not discharge saw-dust and refuse into the stream except as is indispensable to his beneficial use of the water; and may be restrained by injunction. *Canfield v. Andrews* (Vt.), 828.
- Right to flow by dam.]** See EASEMENT, 881.

WILL.

1. **Bequest of debt.]** A bequest of a debt due from the legatee to the testator is subject to the debts of the testator, and the legatee shares in the residuary fund. *Cole v. Covington* (N. C.), 458.

WILL — Continued.

2. Evidence—burden of proof to establish.] The burden of proof of the sanity of a testator is on the proponents of a will, but not so of absence of fraud or undue influence. *McMechen v. McMechen* (W. Va.), 682.
3. Mistake — construction.] A testator owned only 160 acres of land, one-half in section 27, the other being the east half of the north-east quarter of section 28. He devised the former half by a correct description, but in devising the other the word "south" was used by mistake for "north." *Held*, that the erroneous part should be rejected, and the devise would take effect. *Merrick v. Merrick* (Ohio), 493.

WITNESS.

Attorney as — evidence of interest.] When an attorney becomes a witness for his client in a suit which he is conducting for him, it is competent to show that he has an agreement with his client, entitling him to a retainer and a certain portion of the amount to be recovered. *Moats v. Rymer* (W. Va.), 708.

See NEGOTIABLE INSTRUMENT, 682.

WORDS.

- "Citizen." See STATUTE, 289.
- "Head of Family." See EXECUTION, 107.
- "Implement." See EXECUTION, 422.
- "Improvement upon land." See MECHANICS' LIEN, 117.
- "More or less." See MISTAKE, 371.
- "Necessity." See SUNDAY, 614.
- "Personal goods." See CRIMINAL LAW, 599.
- "Public enemies." See OFFICE AND OFFICER, 322.
- "Written order." See STATUTE, 121.

